### To read

Martin H. Redish, The Value of Free Speech,

CASS R. SUNSTEIN, REPUBLIC.COM

### Theory shell ides

Interp – if saying hate speech bad, must propose a counterplan with a method for colleges to regulate hate speech

### Ideas

1. answer to wilderson – permutation, otherwise people won’tbe allowed to read wilderson

#### Permitting free speech is necessary to allow criticisms of the state

Friedersdorf 15, Conor. (CONOR FRIEDERSDORF is a staff writer at The Atlantic, where he focuses on politics and national affairs. He lives in Venice, California, and is the founding editor of The Best of Journalism, a newsletter devoted to exceptional nonfiction.) The Glaring Evidence That Free Speech Is Threatened on Campus. <http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/> Mar 4, 2015.

The United States proudly maintains a strongly exceptionalist tradition with respect to the meaning and scope of the First Amendment. Whether one dates this tradition to New York Times Co. v. Sullivan1 or to Brandenburg v. Ohio, 2 in the contemporary United States, the government generally lacks power to proscribe speech based on either its content or viewpoint. Criticism of the government enjoys robust protection, and even speech calling for its violent overthrow enjoys constitutional protection absent a clear and present danger of imminent lawlessness.3 The Supreme Court has explained that: the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.4 This rule applies because of “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”5

#### Theory shell – aff must clarify in the AC what free speech is protected by the first amendment

An a priori that’s like – free speech limiations are like – there aren’t two sides to every issue – which contradicts the principle of debate (what do you think marshall?)

### Fukuyama

#### Ideals shape reality – the material world is not the cause of certain mindsets

Fukuyama 89. The End of History? Francis Fukuyama (Francis Fukuyama is deputy director of the State Department's policy planning staff and

former analyst at the RAND Corporation), The National Interest, Summer 1989

Failure to understand that the roots of economic behavior lie in the realm of consciousness and culture leads to the common mistake of attributing material causes to phenomena that are essentially ideal in nature. For example, it is commonplace in the West to interpret the reform movements first in China and most recently in the Soviet Union as the victory of the material over the ideal -- that is, a recognition that ideological incentives could not replace material ones in stimulation a highly productive modern economy, and that if one wanted to prosper one had to appeal to baser forms of self-interest. But the deep defects of socialist economies were evident thirty or forty years ago to anyone who chose to look. Why was it that these countries moved away from central planning in the 1980's? The answer must be found in the consciousness of the elites and leaders ruling them, who decided to opt for the "Protestant" life of wealth and risk over the "Catholic" path of poverty and security.8 That change was in no way made inevitable by the material condition was in which either country found itself on the eve of the reform, but instead came about as the result of the victory of one idea over another.9

For Kojève, as for all good Hegelians, understanding the underlying processes of history requires understand**ing** developments in the realm of consciousness or ideas, since consciousness will ultimately remake the material world in its own image. To say that history ended in 1806 meant that mankind's ideological evolution ended in the ideals of the French or American Revolutions: while particular regimes in the real world might not implement these ideals fully, their theoretical truth is absolute and could not be improved upon. Hence it did not mater to Kojève that the consciousness of the postwar generation of Europeans had not been universalized throughout the world; if ideological development had in fact ended, the homogenous state would eventually become victorious throughout the material world.

### Krotoszynski

Krotoszynski 15. RONALD J. KROTOSZYNSKI, JR. (John S. Stone Chair, Professor of Law, and Director of Faculty Research, University of Alabama School of Law.) Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment. moritzlaw.osu.edu/students/groups/oslj/files/2015/07/10-Krotoszynski-Jr.pdf NP 12/11/16.

### Harrison

#### Revenge porn might not be protected speech

Harrison. Revenge Porn: Protected by the Constitution? By: Anne Harrison . Student Writer for The Journal of Gender, Race & Justice, Volume 18. https://jgrj.law.uiowa.edu/article/revenge-porn-protected-constitution

Thus far several states’ laws have been challenged and the outcomes have been mixed. What has been clear is that the laws must be carefully constructed to avoid trampling on protected first amendment grounds. However**, it is not completely out of the question for the Supreme Court to place revenge porn in the zone of no protection as it has done with child pornography and obscenity.**

### Friedersdorf

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#### Permitting free speech is necessary to allow criticisms of the state

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#### Restrictions of hate speech/libel/speech that doesn’t promote democratic principles are consistent with the first amendment

Friedersdorf 15, Conor. (CONOR FRIEDERSDORF is a staff writer at The Atlantic, where he focuses on politics and national affairs. He lives in Venice, California, and is the founding editor of The Best of Journalism, a newsletter devoted to exceptional nonfiction.) The Glaring Evidence That Free Speech Is Threatened on Campus. <http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/> Mar 4, 2015.

Consistent with these views, Sunstein believes that contemporary free speech jurisprudence is grossly overprotective of low value speech and therefore a problem in need of a solution.45 He complains that current free speech theory and practice “safeguards speech that has little or no connection with democratic aspirations and that produces serious social harm.”46 He posits that contemporary free speech doctrine embraces an unpersuasive “rhetoric of absolutism” and “refuses to engage in sensible and salutary balancing.”47 Sunstein urges instead an approach that embraces the notion “that government has reasonably broad power to regulate (among other things) commercial speech, libelous speech, scientific speech with potential military applications, speech that invades privacy, disclosure of the name of rape victims, and certain forms of pornography and hate speech.”48 In sum, government speech regulations designed to enhance “the principle of popular sovereignty” should be deemed fully consistent with the First Amendment.49

### Kretzmer

#### Racism undermines democratic principles and leads to unspeakable atrocities

Kretzmer 87, David. (Louis Marshall Professor of Environmental Law, Hebrew University of Jerusalem) *Freedom of Speech and Racism.* Cardozo Law Review. Vol. 8:445. 1987. NP 1/2/17.

My discussion proceeds from two propositions which I shall not attempt to prove and which I trust the reader will accept. The first proposition is that racism and racial discrimination are, and have been acknowledged to be, social evils that offend fundamental princi- ples of a democratic society. It matters little whether we talk in terms of the United Nations Universal Declaration of Human Rights' state- ment that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the founda- tion of freedom, justice and peace in the world,"5 the Israel Declara- tion of Independence's promise of "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex, ' 6 or the United States Constitution's guarantee of "equal protec- tion of the laws." 7 Theories and ideologies of racism have been for- mally rejected by all modern democracies.' This rejection has not been confined to mere flowery declarations and statements of intent. Active steps have been taken by governments to eradicate practices carried over from the days in which such theories and ideologies were prevalent. Thus, for example, most modern democracies have en- acted statutes which outlaw racial discrimination in the provision of goods and services.9 The second proposition on which my argument is based is that in modern times racism has either led to, or facilitated, the commission of unspeakable crimes and caused untold human suffering. Indeed it is hard to believe that any other ideology has led to more human suf- fering. Historical experience teaches us that racism is not merely an- other of society's daily evils. Rather, it is an evil that can take on catastrophic proportions.

#### UN declaration of human rights prohibits racism, and prioritizes it over protection of freedom of expression

Kretzmer 87, David. (Louis Marshall Professor of Environmental Law, Hebrew University of Jerusalem) *Freedom of Speech and Racism.* Cardozo Law Review. Vol. 8:445. 1987. NP 1/2/17.

Recognition of the above propositions, especially the second, be- came universal when the Second World War ended and the crimes of the racist Nazi regime were revealed. Combating racism in all its forms became a top priority, taking precedence over other valued principles, including freedom of expression. Thus, article 7 of the ￼CARDOZO LAW REVIEW [Vol. 8:445 Universal Declaration of Human Rights adopted by the General As- sembly of the United Nations on December 10, 1948 states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against 10 any incitement to such discrimination."' Even more explicit is the International Covenant on Civil and Political Rights adopted by the General Assembly in 1966.1 While article 19 of the Covenant guarantees the right to freedom of expres- sion,"2 article 20 provides: "Any advocacy of national, racial or reli- gious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."' 3

#### Racism > freedom of expression in U.S.//U.S. hasn't ratified UN covenants abt freedom of expression

Kretzmer 87, David. (Louis Marshall Professor of Environmental Law, Hebrew University of Jerusalem) *Freedom of Speech and Racism.* Cardozo Law Review. Vol. 8:445. 1987. NP 1/2/17.

The United States is one democratic country in which freedom of expression arguments have prevailed over damage caused by racism and racist behavior. While a few states still have group defamation laws on their statute books,23 and while the Supreme Court upheld the constitutionality of such laws in the 1952 decision Beauharnaisv. Illinois,24 most civil libertarians in the United States vehemently op- pose any restrictions on freedom of expression, including those inher- ent in anti-hate laws.25 They argue that group defamation laws are inconsistent with the first amendment and that although the Supreme 26 Court has not formally overruled Beauharnais, it is no longer good law.2" The United States voted for adoption of the International Cov- enant on Civil and Political Rights28 and signed the Convention on the Elimination of All Forms of Racial Discrimination 9 but these conventions have not been ratified. In the presidential message to the Senate, which accompanied the President's request for advice and consent on the conventions, the State Department took the line that the convention provisions regarding bans on racist speech are con- trary to the freedom of speech guaranteed by the United States Con- stitution. It therefore recommended that the United States should attach reservations to its ratification of these treaties.3 °

### Haidt

#### Free speech limitations don't prepare people for the REAL WORLD

Greg Lukianoff and Jonathan Haidt, September 2015, "How Trigger Warnings Are Hurting Mental Health on Campus," Atlantic, http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/, accessed 1-6-2017

There’s a saying common in education circles: Don’t teach students what to think; teach them how to think. The idea goes back at least as far as Socrates. Today, what we call the Socratic method is a way of teaching that fosters critical thinking, in part by encouraging students to question their own unexamined beliefs, as well as the received wisdom of those around them. Such questioning sometimes leads to discomfort, and even to anger, on the way to understanding. But vindictive protectiveness teaches students to think in a very different way. It prepares them poorly for professional life, which often demands intellectual engagement with people and ideas one might find uncongenial or wrong. The harm may be more immediate, too. A campus culture devoted to policing speech and punishing speakers is likely to engender patterns of thought that are surprisingly similar to those long identified by cognitive behavioral therapists as causes of depression and anxiety. The new protectiveness may be teaching students to think pathologically.

#### Limitations on free speech increase partisan divides and mitigate potential for conflict resolution and reconciliation of conflicting viewpoints

Greg Lukianoff and Jonathan Haidt, September 2015, "How Trigger Warnings Are Hurting Mental Health on Campus," Atlantic, http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/, accessed 1-6-2017

These same children grew up in a culture that was (and still is) becoming more politically polarized. Republicans and Democrats have never particularly liked each other, but survey data going back to the 1970s show that on average, their mutual dislike used to be surprisingly mild. Negative feelings have grown steadily stronger, however, particularly since the early 2000s. Political scientists call this process “affective partisan polarization,” and it is a very serious problem for any democracy. As each side increasingly demonizes the other, compromise becomes more difficult. A recent study shows that implicit or unconscious biases are now at least as strong across political parties as they are across races. So it’s not hard to imagine why students arriving on campus today might be more desirous of protection and more hostile toward ideological opponents than in generations past. This hostility, and the self-righteousness fueled by strong partisan emotions, can be expected to add force to any moral crusade. A principle of moral psychology is that “morality binds and blinds.” Part of what we do when we make moral judgments is express allegiance to a team. But that can interfere with our ability to think critically. Acknowledging that the other side’s viewpoint has any merit is risky—your teammates may see you as a traitor.

#### Exposure to controversial ideas helps people cope with trauma, trigger warnings are antithetical to this

Greg Lukianoff and Jonathan Haidt, September 2015, "How Trigger Warnings Are Hurting Mental Health on Campus," Atlantic, http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/, accessed 1-6-2017

For millennia, philosophers have understood that we don’t see life as it is; we see a version distorted by our hopes, fears, and other attachments. The Buddha said, “Our life is the creation of our mind.” Marcus Aurelius said, “Life itself is but what you deem it.” The quest for wisdom in many traditions begins with this insight. Early Buddhists and the Stoics, for example, developed practices for reducing attachments, thinking more clearly, and finding release from the emotional torments of normal mental life. Cognitive behavioral therapy is a modern embodiment of this ancient wisdom. It is the most extensively studied nonpharmaceutical treatment of mental illness, and is used widely to treat depression, anxiety disorders, eating disorders, and addiction. It can even be of help to schizophrenics. No other form of psychotherapy has been shown to work for a broader range of problems. Studies have generally found that it is as effective as antidepressant drugs (such as Prozac) in the treatment of anxiety and depression. The therapy is relatively quick and easy to learn; after a few months of training, many patients can do it on their own. Unlike drugs, cognitive behavioral therapy keeps working long after treatment is stopped, because it teaches thinking skills that people can continue to use. The goal is to minimize distorted thinking and see the world more accurately. You start by learning the names of the dozen or so most common cognitive distortions (such as overgeneralizing, discounting positives, and emotional reasoning; see the list at the bottom of this article). Each time you notice yourself falling prey to one of them, you name it, describe the facts of the situation, consider alternative interpretations, and then choose an interpretation of events more in line with those facts. Your emotions follow your new interpretation. In time, this process becomes automatic. When people improve their mental hygiene in this way—when they free themselves from the repetitive irrational thoughts that had previously filled so much of their consciousness—they become less depressed, anxious, and angry. The parallel to formal education is clear: cognitive behavioral therapy teaches good critical-thinking skills, the sort that educators have striven for so long to impart. By almost any definition, critical thinking requires grounding one’s beliefs in evidence rather than in emotion or desire, and learning how to search for and evaluate evidence that might contradict one’s initial hypothesis. But does campus life today foster critical thinking? Or does it coax students to think in more-distorted ways? Let’s look at recent trends in higher education in light of the distortions that cognitive behavioral therapy identifies. We will draw the names and descriptions of these distortions from David D. Burns’s popular book Feeling Good, as well as from the second edition of Treatment Plans and Interventions for Depression and Anxiety Disorders, by Robert L. Leahy, Stephen J. F. Holland, and Lata K. McGinn.

Burns defines emotional reasoning as assuming “that your negative emotions necessarily reflect the way things really are: ‘I feel it, therefore it must be true.’ ” Leahy, Holland, and McGinn define it as letting “your feelings guide your interpretation of reality.” But, of course, subjective feelings are not always trustworthy guides; unrestrained, they can cause people to lash out at others who have done nothing wrong. Therapy often involves talking yourself down from the idea that each of your emotional responses represents something true or important. Emotional reasoning dominates many campus debates and discussions. A claim that someone’s words are “offensive” is not just an expression of one’s own subjective feeling of offendedness. It is, rather, a public charge that the speaker has done something objectively wrong. It is a demand that the speaker apologize or be punished by some authority for committing an offense. There have always been some people who believe they have a right not to be offended. Yet throughout American history—from the Victorian era to the free-speech activism of the 1960s and ’70s—radicals have pushed boundaries and mocked prevailing sensibilities. Sometime in the 1980s, however, college campuses began to focus on preventing offensive speech, especially speech that might be hurtful to women or minority groups. The sentiment underpinning this goal was laudable, but it quickly produced some absurd results. What are we doing to our students if we encourage them to develop extra-thin skin just before they leave the cocoon of adult protection? Among the most famous early examples was the so-called water-buffalo incident at the University of Pennsylvania. In 1993, the university charged an Israeli-born student with racial harassment after he yelled “Shut up, you water buffalo!” to a crowd of black sorority women that was making noise at night outside his dorm-room window. Many scholars and pundits at the time could not see how the term water buffalo (a rough translation of a Hebrew insult for a thoughtless or rowdy person) was a racial slur against African Americans, and as a result, the case became international news. Claims of a right not to be offended have continued to arise since then, and universities have continued to privilege them. In a particularly egregious 2008 case, for instance, Indiana University–Purdue University at Indianapolis found a white student guilty of racial harassment for reading a book titled Notre Dame vs. the Klan. The book honored student opposition to the Ku Klux Klan when it marched on Notre Dame in 1924. Nonetheless, the picture of a Klan rally on the book’s cover offended at least one of the student’s co-workers (he was a janitor as well as a student), and that was enough for a guilty finding by the university’s Affirmative Action Office. These examples may seem extreme, but the reasoning behind them has become more commonplace on campus in recent years. Last year, at the University of St. Thomas, in Minnesota, an event called Hump Day, which would have allowed people to pet a camel, was abruptly canceled. Students had created a Facebook group where they protested the event for animal cruelty, for being a waste of money, and for being insensitive to people from the Middle East. The inspiration for the camel had almost certainly come from a popular TV commercial in which a camel saunters around an office on a Wednesday, celebrating “hump day”; it was devoid of any reference to Middle Eastern peoples. Nevertheless, the group organizing the event announced on its Facebook page that the event would be canceled because the “program [was] dividing people and would make for an uncomfortable and possibly unsafe environment.” Because there is a broad ban in academic circles on “blaming the victim,” it is generally considered unacceptable to question the reasonableness (let alone the sincerity) of someone’s emotional state, particularly if those emotions are linked to one’s group identity. The thin argument “I’m offended” becomes an unbeatable trump card. This leads to what Jonathan Rauch, a contributing editor at this magazine, calls the “offendedness sweepstakes,” in which opposing parties use claims of offense as cudgels. In the process, the bar for what we consider unacceptable speech is lowered further and further. Since 2013, new pressure from the federal government has reinforced this trend. Federal antidiscrimination statutes regulate on-campus harassment and unequal treatment based on sex, race, religion, and national origin. Until recently, the Department of Education’s Office for Civil Rights acknowledged that speech must be “objectively offensive” before it could be deemed actionable as sexual harassment—it would have to pass the “reasonable person” test. To be prohibited, the office wrote in 2003, allegedly harassing speech would have to go “beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.” But in 2013, the Departments of Justice and Education greatly broadened the definition of sexual harassment to include verbal conduct that is simply “unwelcome.” Out of fear of federal investigations, universities are now applying that standard—defining unwelcome speech as harassment—not just to sex, but to race, religion, and veteran status as well. Everyone is supposed to rely upon his or her own subjective feelings to decide whether a comment by a professor or a fellow student is unwelcome, and therefore grounds for a harassment claim. Emotional reasoning is now accepted as evidence.

#### Discussing controversial viewpoints is key to encourage plurality of opinions, productive discourse, and preparation to engage with controversial views

Greg Lukianoff and Jonathan Haidt, September 2015, "How Trigger Warnings Are Hurting Mental Health on Campus," Atlantic, http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/, accessed 1-6-2017

If our universities are teaching students that their emotions can be used effectively as weapons—or at least as evidence in administrative proceedings—then they are teaching students to nurture a kind of hypersensitivity that will lead them into countless drawn-out conflicts in college and beyond. Schools may be training students in thinking styles that will damage their careers and friendships, along with their mental health. fortune-telling and trigger warnings Burns defines fortune-telling as “anticipat[ing] that things will turn out badly” and feeling “convinced that your prediction is an already-established fact.” Leahy, Holland, and McGinn define it as “predict[ing] the future negatively” or seeing potential danger in an everyday situation. The recent spread of demands for trigger warnings on reading assignments with provocative content is an example of fortune-telling. The idea that words (or smells or any sensory input) can trigger searing memories of past trauma—and intense fear that it may be repeated—has been around at least since World War I, when psychiatrists began treating soldiers for what is now called post-traumatic stress disorder. But explicit trigger warnings are believed to have originated much more recently, on message boards in the early days of the Internet. Trigger warnings became particularly prevalent in self-help and feminist forums, where they allowed readers who had suffered from traumatic events like sexual assault to avoid graphic content that might trigger flashbacks or panic attacks. Search-engine trends indicate that the phrase broke into mainstream use online around 2011, spiked in 2014, and reached an all-time high in 2015. The use of trigger warnings on campus appears to have followed a similar trajectory; seemingly overnight, students at universities across the country have begun demanding that their professors issue warnings before covering material that might evoke a negative emotional response. In 2013, a task force composed of administrators, students, recent alumni, and one faculty member at Oberlin College, in Ohio, released an online resource guide for faculty (subsequently retracted in the face of faculty pushback) that included a list of topics warranting trigger warnings. These topics included classism and privilege, among many others. The task force recommended that materials that might trigger negative reactions among students be avoided altogether unless they “contribute directly” to course goals, and suggested that works that were “too important to avoid” be made optional. It’s hard to imagine how novels illustrating classism and privilege could provoke or reactivate the kind of terror that is typically implicated in PTSD. Rather, trigger warnings are sometimes demanded for a long list of ideas and attitudes that some students find politically offensive, in the name of preventing other students from being harmed. This is an example of what psychologists call “motivated reasoning”—we spontaneously generate arguments for conclusions we want to support. Once you find something hateful, it is easy to argue that exposure to the hateful thing could traumatize some other people. You believe that you know how others will react, and that their reaction could be devastating. Preventing that devastation becomes a moral obligation for the whole community. Books for which students have called publicly for trigger warnings within the past couple of years include Virginia Woolf’s Mrs. Dalloway (at Rutgers, for “suicidal inclinations”) and Ovid’s Metamorphoses (at Columbia, for sexual assault). Jeannie Suk’s New Yorker essay described the difficulties of teaching rape law in the age of trigger warnings. Some students, she wrote, have pressured their professors to avoid teaching the subject in order to protect themselves and their classmates from potential distress. Suk compares this to trying to teach “a medical student who is training to be a surgeon but who fears that he’ll become distressed if he sees or handles blood.” However, there is a deeper problem with trigger warnings. According to the most-basic tenets of psychology, the very idea of helping people with anxiety disorders avoid the things they fear is misguided. A person who is trapped in an elevator during a power outage may panic and think she is going to die. That frightening experience can change neural connections in her amygdala, leading to an elevator phobia. If you want this woman to retain her fear for life, you should help her avoid elevators. But if you want to help her return to normalcy, you should take your cues from Ivan Pavlov and guide her through a process known as exposure therapy. You might start by asking the woman to merely look at an elevator from a distance—standing in a building lobby, perhaps—until her apprehension begins to subside. If nothing bad happens while she’s standing in the lobby—if the fear is not “reinforced”—then she will begin to learn a new association: elevators are not dangerous. (This reduction in fear during exposure is called habituation.) Then, on subsequent days, you might ask her to get closer, and on later days to push the call button, and eventually to step in and go up one floor. This is how the amygdala can get rewired again to associate a previously feared situation with safety or normalcy. Students who call for trigger warnings may be correct that some of their peers are harboring memories of trauma that could be reactivated by course readings. But they are wrong to try to prevent such reactivations. Students with PTSD should of course get treatment, but they should not try to avoid normal life, with its many opportunities for habituation. Classroom discussions are safe places to be exposed to incidental reminders of trauma (such as the word violate). A discussion of violence is unlikely to be followed by actual violence, so it is a good way to help students change the associations that are causing them discomfort. And they’d better get their habituation done in college, because the world beyond college will be far less willing to accommodate requests for trigger warnings and opt-outs. The expansive use of trigger warnings may also foster unhealthy mental habits in the vastly larger group of students who do not suffer from PTSD or other anxiety disorders. People acquire their fears not just from their own past experiences, but from social learning as well. If everyone around you acts as though something is dangerous—elevators, certain neighborhoods, novels depicting racism—then you are at risk of acquiring that fear too. The psychiatrist Sarah Roff pointed this out last year in an online article for The Chronicle of Higher Education. “One of my biggest concerns about trigger warnings,” Roff wrote, “is that they will apply not just to those who have experienced trauma, but to all students, creating an atmosphere in which they are encouraged to believe that there is something dangerous or damaging about discussing difficult aspects of our history.”

If campus culture conveys the idea that visitors must be pure, with résumés that never offend generally left-leaning campus sensibilities, then higher education will have taken a further step toward intellectual homogeneity and the creation of an environment in which students rarely encounter diverse viewpoints. And universities will have reinforced the belief that it’s okay to filter out the positive. If students graduate believing that they can learn nothing from people they dislike or from those with whom they disagree, we will have done them a great intellectual disservice. what can we do now? Attempts to shield students from words, ideas, and people that might cause them emotional discomfort are bad for the students. They are bad for the workplace, which will be mired in unending litigation if student expectations of safety are carried forward. And they are bad for American democracy, which is already paralyzed by worsening partisanship. When the ideas, values, and speech of the other side are seen not just as wrong but as willfully aggressive toward innocent victims, it is hard to imagine the kind of mutual respect, negotiation, and compromise that are needed to make politics a positive-sum game. Rather than trying to protect students from words and ideas that they will inevitably encounter, colleges should do all they can to equip students to thrive in a world full of words and ideas that they cannot control. One of the great truths taught by Buddhism (and Stoicism, Hinduism, and many other traditions) is that you can never achieve happiness by making the world conform to your desires. But you can master your desires and habits of thought. This, of course, is the goal of cognitive behavioral therapy. With this in mind, here are some steps that might help reverse the tide of bad thinking on campus. The biggest single step in the right direction does not involve faculty or university administrators, but rather the federal government, which should release universities from their fear of unreasonable investigation and sanctions by the Department of Education. Congress should define peer-on-peer harassment according to the Supreme Court’s definition in the 1999 case Davis v. Monroe County Board of Education. The Davis standard holds that a single comment or thoughtless remark by a student does not equal harassment; harassment requires a pattern of objectively offensive behavior by one student that interferes with another student’s access to education. Establishing the Davis standard would help eliminate universities’ impulse to police their students’ speech so carefully. Universities themselves should try to raise consciousness about the need to balance freedom of speech with the need to make all students feel welcome. Talking openly about such conflicting but important values is just the sort of challenging exercise that any diverse but tolerant community must learn to do. Restrictive speech codes should be abandoned. Universities should also officially and strongly discourage trigger warnings. They should endorse the American Association of University Professors’ report on these warnings, which notes, “The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual.” Professors should be free to use trigger warnings if they choose to do so, but by explicitly discouraging the practice, universities would help fortify the faculty against student requests for such warnings. Finally, universities should rethink the skills and values they most want to impart to their incoming students. At present, many freshman-orientation programs try to raise student sensitivity to a nearly impossible level. Teaching students to avoid giving unintentional offense is a worthy goal, especially when the students come from many different cultural backgrounds. But students should also be taught how to live in a world full of potential offenses. Why not teach incoming students how to practice cognitive behavioral therapy? Given high and rising rates of mental illness, this simple step would be among the most humane and supportive things a university could do. The cost and time commitment could be kept low: a few group training sessions could be supplemented by Web sites or apps. But the outcome could pay dividends in many ways. For example, a shared vocabulary about reasoning, common distortions, and the appropriate use of evidence to draw conclusions would facilitate critical thinking and real debate. It would also tone down the perpetual state of outrage that seems to engulf some colleges these days, allowing students’ minds to open more widely to new ideas and new people. A greater commitment to formal, public debate on campus—and to the assembly of a more politically diverse faculty—would further serve that goal. Thomas Jefferson, upon founding the University of Virginia, said: This institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it. We believe that this is still—and will always be—the best attitude for American universities. Faculty, administrators, students, and the federal government all have a role to play in restoring universities to their historic mission.

### Kalman

#### Pluralism and freedom of speech is necessary to foster productive discussions and not give the government the power to regulate every action – there are social repercussions for hate speech anyway

Kalman 14, Izzy. Principal Number Nine: Freedom of Speech. <https://www.psychologytoday.com/blog/resilience-bullying/201401/principal-number-nine-freedom-speech>. Jan 28th, 2014. NP 1/6/16.

Many of us in the modern world have come to take freedom of speech for granted. In fact, we have so greatly lost appreciation of its value that we are eagerly getting rid of it, especially in our schools. At popular urging, every state in our Union has passed anti-bullying laws that radically curtail this freedom. In the hope it will put a stop to bullying and create a more civil society, we are making it a crime to say anything that anyone might find offensive. However, the tougher the laws are, the more time and energy schools must invest in prosecuting children for what they say to each other, and the more the hostilities escalate among students, parents, and staff. Ben Franklin on Freedom of Speech Source: http://commons.wikimedia.org/wiki/File:Benjamin\_Franklin\_freedom\_of\_speech\_quote.jpg Our Founding Fathers (U.S.) were very wise people. They studied philosophy intensively and deliberated greatly over everything they put in the Constitution and Bill of Rights. Though few of us realize it, we citizens of democracies enjoy an unprecedented degree of abundance, opportunity, cultural enrichment, and safety because of the wisdom they showed in guaranteeing us freedom of speech. Would you like to live in a society in which the government can do anything it wishes and reporters are only permitted to report what the government wants us to know? Would you like to live in a society that indoctrinates you from early childhood in an official set of beliefs and punishes you for challenging them? Would you like to live in a society in which all of our interpersonal interactions are the business of government officials…in which we can be investigated and punished for saying anything that can upset anyone…in which we must pretend everyone is perfect no matter what is obviously wrong with them…in which we are forbidden from using humor and satire because we might hurt someone’s feelings…in which we are required to inform on each other to the authorities when we witness the other saying something potentially offensive to a third party? Such societies have existed and still do, and our Founding Fathers intended to prevent our country from becoming one of them. They understood that a healthy, evolving society that maximizes human happiness requires permitting us to say words other people don’t like to hear, to challenge popular thinking and even to publicly criticize the government, all without fear of punishment. They understood that it is healthy for us to be free to criticize and insult each other—even if we may be wrong—so that we can become aware of what’s wrong with us and make an effort to improve if we wish. They understood that our feelings are in our own control…that if someone criticizes or insults us, it is entirely up to us whether we get upset or feel grateful. They understood that humans are intelligent beings capable of entertaining opposing ideas and beliefs, yet still be on the same side. They understood that if we get the authorities involved when we feel verbally offended, rather than reducing the hostility between us, it would make us hate each other and want to escalate to physical offense. We would also hate the authorities that punished us. Freedom of speech is, in reality, the Constitutional version of the traditional slogan, “Sticks and stones may break my bones but words will never harm me.” That slogan expresses the fundamental difference between physical aggression and verbal aggression. Physical aggression causes objective harm. It means that if you do it to me, you are the one who harmed me. Words cause subjective harm. It means that if you say them to me and I feel hurt, I really hurt myself. In fact, you may have even been trying to help me by letting me know what’s wrong with me. But instead of appreciating what you said, I felt offended. Should you be punished because I upset myself? Punishments for offensive words are likely to be far worse than the crime and are thus immoral. (See the previous Principle: An Eye for an Eye.) If you are not sure about this, ask yourself the following. In most schools today, the punishments for insults are suspension, and after a couple of suspensions, expulsion from school. What would you rather have me do to you: insult you three times, or get you suspended and then expelled from school? Freedom of speech is mandated by the Golden Rule. Just as we want to have the freedom to say what we want without being punished, we need to let others say whatever they want—no matter how much we don’t like it—and not punish them. Freedom of Speech does not imply that it is moral or wise to indiscriminately say things that can hurt people’s feelings. It just means that it’s not a punishable offense. If we wish to behave morally and wisely, we need to be heedful of our own words. Furthermore, there are natural consequences to our speech. If we offend people they will not like us. They may refuse to be our friends and even turn others against us. Over time, people's responses guide us to figure out how to talk acceptably. To have satisfying social lives, we need to learn to be nice, not be forced to be nice. Note: Freedom of speech does not protect speech that can cause objective harm to people’s bodies or property or deny them liberty. We are not allowed to yell “fire” in a crowded theater, to make up lies about our colleagues and get them fired, or to threaten or incite violence. Freedom of speech only protects speech that can hurt people’s feelings. Moreover, freedom of speech is the solution to most bullying, because most acts of bullying are verbal, and most physical attacks begin with words. When we try to stop people from insulting us, they do it even more. When we allow them to insult us, they quickly stop. What about profanity? Is it covered by freedom of speech? You can see the power of freedom of speech for handling profanity in the following video clip. Because freedom of speech is so important, any attempts to limit it should be undertaken with great caution and reluctance. No Free Speech Source: http://beyond-the-political-spectrum.blogspot.com/2012/12/teasingfreedom-of-expression-or-crime.html Unfortunately, anti-bullying laws are completely eradicating freedom of speech and turning our country into the type of repressive society from which our Founding Fathers wanted to save us. Schools and universities no longer routinely teach the meaning and value of freedom of speech because social scientists have come to believe that the most devastating thing that can happen to a person is for someone to say something that could offend them. They believe that freedom of speech is the enabler of offended feelings rather than the solution. They have replaced the conclusion of the “sticks and stones” slogan with “but words can scar me forever” and “but words can kill me.” This modern indoctrination unwittingly encourages us to get terribly upset when people criticize or insult us…and when we get upset, they are likely to continue insulting us. As a result, bullying is becoming an epidemic in the modern world. If we truly wish to reduce bullying, create a more harmonious school environment, while raising children who are emotionally resilient, we need to intensify our teaching of the meaning and practice of freedom of speech. We need to teach that others have the Constitutional right to say what they want and there is no need for us to get upset by it.

### Lee

Lee 10, Steven P. (Hobart and William Smith Colleges) Hate Speech in the Marketplace of Ideas\* January 2010. NP 1/14/17.

### Saad

It is incumbent on all people living in the West to contribute in defending the liberties and freedoms that previous generations fought hard to garner (see my earlier Psychology Today blog post Be Thankful for Your Liberties and Freedoms as well as my YouTube clip Don’t Succumb to the Tragedy of the Commons, Fight for Liberty!). People who have not lived in societies where such freedoms are lacking if not outright missing assume that their freedoms, whfich they otherwise take for granted, are part of the natural order of things. They are not. Every generation must fight hard to defeat ideological forces that repeatedly seek to quell these freedoms. This brings me to the Garland shootings that took place a few days ago. Apologists and their enablers have repeatedly espoused positions that are perfectly antithetical to the First Amendment. Let me provide you with a few examples: 1) None other than Pope Francis justified violence against those who insult one’s religious beliefs using the crude “if you insult my mother, expect that I’ll punch you” defense. Variants of this grotesque argument include the “if the woman had not dressed provocatively, she would not have been raped” and the “if the woman had not angered her husband, he would not have beaten her.” The logical structure is identical. It is difficult to imagine a greater mockery of the concept of free speech than to argue along those lines. In his 2012 UN address, President Barack Obama stated: “The future must not belong to those who slander the prophet of Islam.” It is extraordinary that a sitting president of the United States could utter such words. He is effectively arguing that there is a red line for free speech, and it is drawn at blasphemy (see my earlier Psychology Today blog post titled Blasphemy Laws Belong in the Dark Ages). No, Mr. President. The future must precisely belong to those who engage in speech that is offensive. Otherwise, freedom of speech is a meaningless concept. 2) Numerous apologists for the Garland shootings are using the “incitement to violence” argument as a valid curtailing of free speech. Astonishingly, they are confusing the incitement of violence contained within the contents of someone’s speech (e.g., “Let’s go out and kill some Jews”) with the violence that ensues when someone’s speech is deemed too offensive! In other words, they are arguing that if you make fun of someone’s religion and they kill you, YOU have incited them to violence and hence you are guilty of incitement to violence. There are countries where the law of the land stipulates this exact viewpoint and they are not part of the West. In a pluralistic society, people have to accept that others do not hold their religious views with any reverence (see my earlier Psychology Today blog posts titled Masturbating with a Crucifix in a Film…No Riots? and Rabbi “Informs” Me That Evolution Has Been Disproven!). It is the most fundamental tenet that defines a secular and free society. If you are unable to fight ideas with ideas, you do not deserve to live in free societies. You despise Holocaust deniers. Ignore them or defeat them with arguments. You dislike the Catholic Church’s position on abortion. Engage the doctrines from which this position stems. You detest Pamela Geller’s views on Islam. Offer a contrary viewpoint that shatters her positions. Freedom of religion does not entitle your religion to have a privileged position within the public sphere. Everyone has the right to practice their religious beliefs in private but expect that people might publicly reject said beliefs. Failure to understand this tenet will very quickly sink us into an abyss from which escape might be impossible.

### Cho

Cho et al 15. Hong-Joong Cho, Jung-Ran Kim1\* and Sang-Gu Kim. Special Education Discourses on Freedom of Speech and Discriminatory Speech

### Salbi

#### Queen Rania is internationally recognized as a moral figure for her compassion and value of human rights

Salbi 15, Zainab. (Zainab Salbi is an author and media commentator and the founder of Women for Women International — a grassroots humanitarian and development organization dedicated to serving women survivors of war. Salbi is an editor at large for Women in the World who travels around the Middle East and North Africa, reporting on the intersection of Middle Eastern and Western cultures.) Jordan’sQueen Rania, longtime champion of women and children, speaks up for refugees. <http://nytlive.nytimes.com/womenintheworld/2015/09/28/jordans-queen-rania-longtime-champion-of-women-and-children-speaks-up-for-refugees/> 9/28/15.

While accepting an award in Germany this month, Queen Rania of Jordan called for extraordinary acts of compassion and global cooperation in addressing the Syrian refugee crisis. German Chancellor Angela Merkel presented the queen with the Walther Rathenau Prize for fostering peace and understanding between East and West. Addressing the hundreds of gathered dignitaries, Queen Rania stressed that “denying refugees their basic rights risks creating a defeated and disillusioned generation who, at their most desperate, could be susceptible to extremists’ ideology.” Her tiny country of 6.8 million has taken in some 1.4 million Syrian refugees — or 20 percent of Jordan’s population — despite it’s own poverty and unemployment woes. At the same time, her region is struggling with an unfathomable expansion of fundamentalism. Which means that voices such as hers — calling for development, stability and progress — have become all the more critical, and rare. For Arab women in particular, Queen Rania is one of a scant handful of role models at a time when many young women throughout the Arab world are desperately seeking inspiration from within their own culture. So when Queen Rania speaks, her voice is heard loud and clear.

#### Queen Rania is recognized by people in Jordan as a compassionate and dedicated moral figure

Salbi 15, Zainab. (Zainab Salbi is an author and media commentator and the founder of Women for Women International — a grassroots humanitarian and development organization dedicated to serving women survivors of war. Salbi is an editor at large for Women in the World who travels around the Middle East and North Africa, reporting on the intersection of Middle Eastern and Western cultures.) Jordan’sQueen Rania, longtime champion of women and children, speaks up for refugees. <http://nytlive.nytimes.com/womenintheworld/2015/09/28/jordans-queen-rania-longtime-champion-of-women-and-children-speaks-up-for-refugees/> 9/28/15.

She is vaunted by the international media for her active role in promoting youth through the World Economic Forum and The Clinton Global Initiative. She has the beauty, the eloquence, and the title. Not so enviable, though, are the dual positions she must sustain as a queen with conviction in a region where every small step forward for women is seen as a threat by large segments of society. Queen Rania awards The Leadership in Civil Society to Malala Yousafzai, at the Clinton Global Citizen Award ceremony in 2013 in New York City. (Ramin Talaie/Getty Images) Queen Rania, with education activist Malala Yousafzai, at the Clinton Global Citizen Award ceremony in 2013. (Ramin Talaie/Getty Images) While walking the walk for her values, at times she had paid the price for her moral backbone, as when she campaigned for legal child-protection reforms — no trifling matter in Jordan and the broader Middle East, where secrecy and a culture of shame keep families from talking about their “dirty laundry.” When the Queen insisted that children be legally protected from abuse, police officials who had originally rejected any policy that would question a father’s authority over his children — even in cases of abuse or rape — were persuaded to collaborate with her campaign. But then there are the setbacks. When she advocated for equality of citizenship for men and women, she took the flack when the cause backfired. In Jordan as in the rest of the Arab world, when a woman marries a foreigner, her children are not necessarily granted citizenship Palestinian/Jordanian origin is a major point of contention in Jordan, and the queen’s advocacy aroused old fears and tensions between Palestinians and Jordanians. Despite such pressures, Queen Rania has taken on charged issues including the spirit of Islam and the deformities foisted on it by groups such as ISIS, expressing what most Arabs believe but are afraid to say out loud. In particular, she has won the hearts of the youth. “We call her the ‘Queen of Hearts,’ said Ala’a, a 33-year-old Jordanian man, when asked about what he thinks of Queen Rania. “We love her! She is of the people, with the people. She visits us in our own context, be it the market or our schools. She is humble and we love her.” Fatima, a 29-year-old Jordanian, opened up her Instagram account to show me a photo of Queen Rania with her children, and a comment posted by the queen: “Kids are getting older.” The expression she used, al ayal kebro, is borrowed from a famous Egyptian comedy of the same title, lending a familiar tone to the royal’s social media feed. “Do you know any Queen that is that accessible to the people? She is unique in her approach and reach. She invests a lot in the youth and gives us lots of opportunity with her attention, which is so helpful. She is loved,” Fatima says. Queen Rania inspires young women who are excited about her active role in social media, poor women who benefit from her charitable work with the Jordan River Foundation, and young Arab designers whose careers skyrocket when she appears in one of their creations. And she provides hope to Juliana, a former prisoner in Lebanon, whose spirits were lifted by the sight of Queen Rania wearing a bag she had made while taking part in a rehabilitation workshop run by the Lebanese firm Sarah’s bags. Says Juliana, “When I saw her carrying a purse that I had embroidered while I was in prison, it made all the difference for me. It gave me dignity and pride and made me lift my head up knowing that I can still be respected in society.” As one of the very few women in the region who is truly heard, Queen Rania of the Hashemite Kingdom carries a great weight of responsibility in the Arab world, attracting both praise and criticism. Yet she is holding her own, with a rare combination of grace and guts, as a critical voice for a very critical time in the Middle East.

### Carthy

#### Look at all these good things that she cares about

Carthy 9. Roi Carthy, 5-19-2009, "An Interview With Queen Rania of Jordan On How Twitter Can Help Change The World," TechCrunch, https://techcrunch.com/2009/05/19/an-interview-with-queen-rania-of-jordan-on-how-twitter-can-help-change-the-world/, accessed 1-14-2017. NP

If you are unfamiliar with Queen Rania’s work, here’s what she’s been up to lately: Among her many activities in Jordan, Queen Rania focuses on promoting excellence and innovation in education. As UNICEF’s Eminent Advocate for Children, she is a staunch defender of children’s welfare. Queen Rania has also been vocal about the importance of cross cultural dialogue in fostering greater understanding, tolerance and acceptance across the world. Her YouTube initiative exemplifies this.

In an interview, she professed her affirmation that hate speech should not be tolerated:

Carthy 9. Roi Carthy, 5-19-2009, "An Interview With Queen Rania of Jordan On How Twitter Can Help Change The World," TechCrunch, https://techcrunch.com/2009/05/19/an-interview-with-queen-rania-of-jordan-on-how-twitter-can-help-change-the-world/, accessed 1-14-2017. NP

TC: What is your position on Holocaust denial groups on social networks specifically, and what should be done about hate speech in general?

**Her Majesty Queen Rania: I think that, as is the case offline, we should not be tolerant of hate speech, racist comments, or groups that promote hatred or intolerance** in any shape or form.

### Sanders

#### Structural inequalities preclude deliberation from being meaningful

Sanders 97, Lynn M. *Against deliberation.* Political Theory June 1997 v25 n3 p347(30)

The facts about deliberation in American settings, at least as I have gathered them, show that what happens when American citizens talk to each other is often neither truly deliberative nor really democratic. This is partly, but not only, because the material prerequisites for deliberation are unequally distributed. It is partly, but not only, because some Americans are more likely to be persuasive than others, that is, to be learned and practiced in making arguments that would be recognized by others as reasonable ones--no matter how worthy or true their presentations actually are. It is also because some Americans are apparently less likely than others to be listened to; even when their arguments are stated according to conventions of reason, they are more likely to be disregarded. Although deliberators will always choose to disregard some arguments, when this disregard is systematically associated with the arguments made by those we know already to be systematically disadvantaged, we should at least reevaluate our assumptions about deliberation’s democratic potential. Deliberation requires not only equality in resources and the guarantee of equal opportunity to articulate persuasive arguments but also equality in "epistemological authority," in the capacity to evoke acknowledgement of one’s arguments. These are insidious problems, not easily addressed within the confines of arguments about deliberation, which depend crucially on the accomplishment by democratic citizens of mutual respect for each other, but are bereft of evaluations of whether this is a realistic possibility. Because the achievement of mutual respect is practically remote, democratic theorists should ask whether arguments on behalf of deliberation do anything to bring about the achievement of truly democratic, or indeed truly deliberative, discussions. Perhaps a model of democratic discussion other than deliberation would attend more directly to these insidious problems. So I conclude this essay by suggesting that we forget deliberation for the time being, and try to imagine a model for democratic politics that more plausibly encourages mutual respect--something that advocates of deliberation, after all, really want.

#### Deliberation relegitimizes exclusion from society

Sanders 97, Lynn M. *Against deliberation.* Political Theory June 1997 v25 n3 p347(30)

Some critics have noticed the manifestation of this disjuncture in the abstract talk of democratic theorists. Indeed, this abstraction may be absolutely necessary for proponents of deliberative democracy, because acknowledgment of the hardest problems, that is, the systematic disregard of ascriptively defined groups such as women and Blacks, would violate the deliberative tenet to attend to the force of argument rather than the interests of particular groups (Phillips 1995, 155 ff.). Indeed, democratic citizens as described in these theories seem to live on another planet (quite literally, in the case of Ackerman 1980): they are devoid of race, class, and gender and all the benefits and liabilities associated by Americans with these features. Abstraction from these ascriptive characteristics--their disregard--clearly assists attempts to end discrimination based upon them; as well, however, abstraction deprives theorists of a way to notice systematic patterns of exclusion.

A deeper, more difficult problem than abstraction lurks. Even if democratic theorists notice the inequities associated with class and race and gender and, for example, recommend equalizing income and education to redistribute the resources needed for deliberation--even if everyone can deliberate and learn how to give reasons--some people’s ideas may still count more than others. Insidious prejudices may incline citizens to hear some arguments and not others. Importantly, this prejudice may be unrecognized by those citizens whose views are disregarded as well as by other citizens. Proponents of deliberation are especially badly equipped to address this problem. They depend on open arguments against prejudice to overcome it, and on the susceptibility of prejudice to reason. Not only do they believe in the existence of settings where nothing matters except for an idea’s intellectual force and its communal utility, as in Habermas’s ideal speech situation (Habermas [1962] 1992; Calhoun 1992) or in Ackerman’s insistence that a speaker’s superiority can never tee invoked as a reason to prefer an idea(1980, 4, 11); they also expect prejudices to be challenged in deliberative settings and for others to "face up" to them (Gutmann and Thompson 1996). When disregard based in prejudice goes unrecognized by both those who are subject to it and those who are prejudiced, prejudices cannot possibly be challenged. Prejudice and privilege do not emerge in deliberative settings as bad reasons, and they are not countered by good arguments. They are too sneaky, invisible, and pernicious for that reasonable process. So worrying about specifying what counts as a good argument, or trying to enhance reason-giving either via the formulation of better rules and procedures or by providing the time, money, and education necessary to become a responsible deliberative citizen, does not engage some of the most serious challenges to the possibility of achieving democratic deliberation. Some people might be ignored no matter how good their reasons are, no matter how skillfully they articulate them, and when this happens, democratic theory doesn’t have an answer, because one cannot counter a pernicious group dynamic with a good reason. Sometimes, giving reasons isn’t anything like the right project and suggesting that the disregarded argue against prejudice or discrimination is offensive in and of itself.(4)

#### Democratic deliberation erases particular interests

Sanders 97, Lynn M. *Against deliberation.* Political Theory June 1997 v25 n3 p347(30)

Including everyone in the pursuit of a common interest or identity seems democratic: it’s a goal founded on expanded participation, and it contains the aspiration that something worthwhile--a sense of empowerment and a stake in the community--will come out of this participation. Yet this democratic aim carries certain antidemocratic implications. Both the pursuit of a common voice and the vehicle--deliberation for everyone--used in that pursuit may be fundamentally antagonistic to important democratic aims. There are probably limits to the extent to which everyone can deliberate together, which I will discuss later. But the pursuit of a common voice itself is, somewhat paradoxically, an exclusive aim. Although modern democratic theorists did not decide to focus on a communal identity because they thought the masses needed special urging to see beyond their narrow and selfish concerns, in the end this focus ends up resonating with conservative indictments of mass politics in potentially troubling ways. When Jane Mansbridge defines deliberation, she also reveals the contemporary democratic inclination toward the pursuit of commonality. Mansbridge, however, is careful to allow for a form of deliberation that advocates the articulation of difference: deliberation may "shape the character of those who engage in it, in the direction of more habitually recognizing conflicts of interest." If patterns of oppression make it unlikely that some groups will succeed in articulating these differences, they need to retreat from the more general discussion and deliberate among themselves, to discover their true interests. Ultimately, however, commonality is the goal: "the presence of others encourages `we’ rasher than `I’ thinking. . . . when a society needs to discourage individual self-interest and encourage altruism, deliberation in public will often serve that end" (Mansbridge 1991, 7-8). Other contemporary theorists share Mansbridge’s recognition that the project of mutual deliberation needs to preserve some space for acknowledging conflicts and differences. Hanna Pitkin, for instance, points out that distributive justice--presumably one of the aims of deliberation--requires acknowledging individual selves in the community (Pitkin 1981). Pitkin and Shumer not only acknowledge the possibility of conflict in democratic discussions but consider conflict integral to them: "conflict--handled in democratic ways, with openness and persuasion--is what makes democracy work, what makes for the mutual revision of opinions and interest" (Pitkin and Shumer 1982, 47; see also Gutmann and Thompson 1996). Yet clearly there’s a priority here, an expectation of arrival at some kind of consensus. Special interests are to be revised, modified, or shifted in the name of discovering something common. In addition, common life not only emerges in deliberation but is expected to assist it. Charles Larmore, along with John Rawls, suggests that disagreements may be resolved or bypassed when citizens can refer to the "beliefs they still share" or to "common ground" (Larmore 1996, referring to Rawls 1971). Pitkin and Shumer, Mansbridge, and Larmore, represent attempts by contemporary democratic theorists to acknowledge conflict and difference within a broader project to uncover, and rely upon, a communal orientation. These approaches, however, carry a risk that particular perspectives and interests will be effaced, especially in the interests of minorities or oppressed groups. Neither perspective suggests a way to identify when or if particular interests should be publicly honored. Neither suggests a standard for deciding when the community as a whole must attend to very particular perspectives, or whether such attention has any place in deliberation. Yet surely there are occasions when democratic assemblies should do nothing like pursue the common good but instead should just listen and respond to particular complaints. The testimony of Japanese Americans relocated during World War II before Congress was, for example, such a moment. The first major problem with the democratic pursuit of a communal orientation through deliberation is this risk of discrediting particular interests.

#### Democratic deliberation undermines social movements based on particularity

Sanders 97, Lynn M. *Against deliberation.* Political Theory June 1997 v25 n3 p347(30)

Yet what is acknowledged by the listener is only what can be incorporated, what is identifiably similar. While what is different, distinctive, unique, or uncommon may be articulated, it is not, on the model of listening detailed by Barber, attended to or acknowledged. Preferred attention to what’s common increases the risks of outright denial of the perspectives of minorities. If these perspectives are unsettling, discomfiting, or if members of the dominant group have an interest in ignoring them, then the risks contained in seeking a common voice increase. For example, White feminists have tended to think in terms of a generic category of woman, an approach which may usefully encourage some form of solidarity but also denies White women’s complicity with racism. This point has emerged clearly in the criticisms that Black feminists have made of the universalizing tendencies in White feminist theory and politics (Smith 1982; hooks 1981; Joseph and Lewis 1981; Dill 1983; Spelman 1988; Collins 1990). Given the difficulties of acknowledging and crediting particular interests in the midst of a broad pursuit of commonality, it is not surprising to find that demanding honor of a higher value than oneself can also work to discredit social movements forged around the particular interests of oppressed groups. The language used by Albert Martin, a husband abandoned in his wife’s pursuit of her own individuality and the author of One Man, Hurt is an extreme example: Martin complains of "the enshrinement of individuality, the freedom of self, at the expense of marital union and social compromise" (quoted in Klatch 1987, 128).

#### Jury discussions as well as groupwork proves that viewpoints of white men are prioritized for arbitrary reasons, rather than allowing inclusion of minority viewpoints

Sanders 97, Lynn M. *Against deliberation.* Political Theory June 1997 v25 n3 p347(30)

The question of whether democrats can achieve democratic goals through deliberation may be addressed by looking at how deliberation actually seems to proceed in settings where American citizens talk to each other, face to face. Status inequalities and regular patterns of social oppression might intrude when Americans deliberate sufficiently to make democratic goals, such as enhancing community and autonomy, remote and unlikely. Depending on how pernicious these problems are, they may persist even when everyone knows how to deliberate and has the time, money, and information for it. Promoting broad participation in democratic discussions may require more than guaranteeing the material prerequisites to deliberation or suggesting the pursuit of a common voice. If American politics is ever considered really democratic, it is in the institution of the jury: juries are supposed to capture what’s best about American democracy. When individual citizens participate in the administration of justice, law seems less remote, less magisterial. Citizen participation helps secure the reputation of legal institutions as at least partly buttressed by popular sovereignty. And juries also seem a bulwark of individual liberties, since jurors are inclined to fend for those who stand accused. The massive empirical study of American juries by Kalven and Zeisel compared verdicts delivered by juries in criminal trials to the determinations judges would have rendered had the cases been heard without juries. Almost four-fifths of the time, judges and juries agreed, but when they differed, jurors were more likely than judges to find in favor of the defendant (Kalven and Zeisel 1966). Further, because citizens are involved in the administration of justice, albeit through the lens of a particular case, they are encouraged to consider the questions before them from a broader, social perspective and to leave aside, at least temporarily, their immediate and personal concerns. Participation on a jury seems to involve exactly the skills and capacities that democrats hope Americans might practice in other settings: the deliberative jury is supposed to be composed and considerate, exactly not an angry mob. In the jury, citizens call on their rational faculties and consider a common, or at least impersonal, not personal, problem. Juries appear to be something like schools for democrats, as Tocqueville suggested they were. But of course Tocqueville had particular lessons in mind, not necessarily those admired by contemporary theorists. Tocqueville considered Americans in need of reminders about status and deference, which he thought were ideally communicated through the mechanism of the civil jury. Unlike criminal trials, where Tocqueville anticipated modern social science by suspecting that jurors would sympathize with defendants, civil trials on his view could encourage juries to look to judges for expertise and guidance. And participation on juries was further laudable, in Tocqueville’s eyes, because each juror "comes into daily contact with the best-educated and most-enlightened members of the upper classes." Tocqueville thought lawyers counted as a "class apart" from the people, resembling "Egyptian priests, being, as they were, the only interpreter[s] of an occult science" (Tocqueville 1969, 275, 267). Although Tocqueville found much to recommend in the humbling aspects of the courtroom, he assumed a basically homogenous jury inferior in class and status to judges and lawyers. He didn’t explore the possibility that citizens might defer to each other. Yet contemporary social scientific evidence suggests that exactly that happens, in ways that are entirely unsurprising and predictable given the inequalities familiar in the broader society. When Americans assemble in juries, they do not leave behind the status, power, and privileges that they hold in the outside world. Most jury deliberations begin with the selection of group leader, a foreperson. Far more often than not, the person selected is a White male with a college degree. Postgraduate work, a high-status occupation, and previous jury experience further enhance the chances of being selected. Women are chosen to head juries much less frequently than their representation on juries suggests they should be (Hans and Vidmar 1986). Gender, racial, and economic privilege do not determine selection as jury leader in a direct or immediate sense, however. Instead, they increase the likelihood of behavior that leads to selection as head of the jury. Speaking first and sitting at the head of the table increase the probability of being chosen as foreperson, and high-status men engage in these behaviors more often (Hans and Vidmar 1986). An account of the way that the jury foreman was selected in the trial of John De Lorean captures these dynamics: "The first item of business was to select a group leader. Vern Lahr, a former highway patrolman, mentioned the issue first and stood capably at the blackboard asking for nominations. Not surprisingly, he was chosen for the job" (Hans and Vidmar, 1986, 16). Selection of the foreperson encapsulates patterns repeated through the course of the jury’s deliberations. Studies conducted over the last four decades have consistently reinforced the basic finding that men talk more in juries; jury leaders, already more likely to be men, are also inclined to participate more than other jury members in deliberation. Even when the foreman is excluded from the calculations of who generally talks most during Political Theory June 1997 v25 n3 p347(30) Page 10 - Reprinted with permission. Additional copying is prohibited. - G A L E G R O U P Information Integrity Against deliberation. deliberations, men still dominate the discussion by significant amounts (Hans and Vidmar 1986; Marsden 1987; Hastie, Penrod, and Pennington 1983). The simple fact that men talk more than women in jury deliberations might give pause to democrats inclined to hold strictly to a standard of equal participation in group discussions. If it’s demonstrable that some kinds of people routinely speak more than others in deliberative settings, as it is, then participation isn’t equal, and one democratic standard has fallen. But democrats needn’t give up so easily. One might relinquish the standard of strictly equal participation and say instead that as long as most or all views available to the group are somehow expressed and considered, it doesn’t matter who says what or whether some people talk more than others. Yet studies of juries suggest that whether an idea is expressed in the first place, whether it is apprehended by the group, and whether it prevails in deliberations, all depend on whether the idea has a talkative promoter. For instance, the mere propensity to talk a lot appears to increase the chances that one will be viewed as presenting compelling arguments. Studies of juries and other small groups indicate that individuals who speak the most are likely to be viewed as most persuasive by other group members and that it is the quantity of remarks, not their quality, that seems to drive these perceptions (Marsden 1987). In principle, each juror’s perspective should be given equal weight in group deliberations, but simply increasing the volume of one’s commentary seems to increase the chances that one’s opinions will prevail. Studies of the behavior of interracial groups in American classrooms support the general finding that emerges from studies of juries, that members of the dominant group in society also tend to dominate in small groups working on a common problem. Dominance is shown in these studies not to be attributable to any greater skill on the part of the dominant group. One early study found that when interracial groups work together on a collective task, White students are more active and influential. Katz, Benjamin and Goldston found that black college students displayed marked social inhibition and subordination to white partners in a cooperative problem-solving situation, even when subjects were matched on intelligence and made to display equal ability at the task . . . Whites initiated more interaction than blacks; both blacks and whites talked more to whites than to blacks. (Cohen 1982, 210-1). Importantly, these studies controlled for factors such as age, height, socioeconomic status, and attitudes toward school. Even when students were matched on these demographic factors as well as on ability at the problem-solving task pursued by the group, high-status members were routinely treated as if their contribution to the group problem were better. They spoke more during group discussions, and they were given more opportunities to make suggestions; in postmeeting questionnaires, group members perceived the high-status participants as having better ideas and as having done more to guide the group. These results hold whether the racial comparisons are between Anglo and Mexican American students, black and white students, Native Americans and whites, or Israelis or European and Middle-Eastern background students (Cohen 1982). If dominance in group discussions is not attributable to the superior skills at reasoning, argument, or deliberation of the dominant group, then it is not likely that distributing the skills for deliberation more widely will solve the problems of unequal participation or influence. Instead, improving democratic discussion seems to require interventions in the structure of group deliberations. Jury studies provide fodder not only for democratic worries about the course of group deliberations in the United States but also for suggestions about how discussions might be structured to make problems of dominance and hierarchy less pressing. For instance, it appears that some styles of group discussion are more likely to elicit the views of all group members than are others. Social psychologists distinguish between "evidence-driven" and "verdict-driven" deliberation styles in juries. Verdict-driven juries decide to take a vote early on to see where everyone stands. They tend to arrive at their final determinations relatively quickly, with the verdict almost always reflecting the position of the majority in the initial vote. By contrast, juries engaging in evidence-driven deliberations tend to discuss the merits of certain perspectives on the evidence without taking an initial vote or otherwise associating certain jurors with certain perspectives. When jury deliberations are focused more on eliciting a range of views instead of on the common problem of arriving at a verdict, they appear likely to provoke both a more considerate discussion and one that leaves jurors more satisfied with their participation: jurors on evidence-driven juries report thinking they have done a good job more frequently than do jurors on verdict-driven Political Theory June 1997 v25 n3 p347(30) Page 11 - Reprinted with permission. Additional copying is prohibited. - G A L E G R O U P Information Integrity Against deliberation. juries (Hans and Vidmar 1986; Brown 1986). Further, if a jury decides to defer voting until discussing the evidence, it can apparently hold off the mechanisms that allow some individuals to dominate discussions: In an ideally fair and rational deliberation process, all the arguments of both factions will be weighed before coming to a decision, which may be required to be explicitly unanimous. The majority, we know, has some power to influence the perceptual judgments of the minority by the force of conformity, which has nothing to do with rational argument, and it is also known that small minorities in juries sometimes agree to go along" with a unanimous verdict although they have not been persuaded that it is correct. (Brown 1986, 286) Verdict-driven deliberations reduce the chances of a broad consideration of all views on the evidence, reduce the likelihood of a rational discussion, and increase the pressures to conformity. But verdict-driven deliberations are more in keeping with a male style of discourse and are more likely to occur when men head juries. Some social-scientific studies suggest that women are more likely than men to encourage an evidence-driven style of deliberation. Women appear to accommodate different points of view better than men do. In studies of as-female groups, the more active speakers tried to draw out the more silent members, which is a key characteristic of evidence-driven juries. In contrast, in all-male groups, the more active members eventually ignored the less active members, which is a key characteristic of verdict-driven juries. The men displayed competitiveness with other men, whereas the women expressed cooperation with other women. In mixed groups, however, the women consistently became more silent. If women are encouraged to speak more and men are reminded to listen more, women may be able to bring to jury deliberations their tendency to engage in evidence-driven discussion. (Marsden 1987, 6034; see also Kanter 1979)

#### Deliberation doesn’t achieve democratic aims

Sanders 97, Lynn M. *Against deliberation.* Political Theory June 1997 v25 n3 p347(30)

A supposition we might draw, putting together the findings about death-qualified juries and what we know about the dynamics of deliberation, is that, to the extent that higher-status individuals dominate jury discussions, juries may veer toward convicting defendants. Further evidence in this direction has emerged from studies of the responses of jurors to testimony by experts on domestic violence, in trials of women who have claimed to have killed their batterers in self-defense. Regina Schuller found that male jurors were "more likely to favor guilty verdicts and to offer unfavorable interpretations of the defendant’s state of mind and of her ability to leave the situation in which she found herself" (Vidmar and Schuller 1989, 154). Attitudes about crime and about who deserves to be convicted are not randomly distributed across the population of jurors. Instead, conviction-proneness appears to be concentrated in individuals who possess characteristics similar to the characteristics of those who tend to dominate discussions. The dominance of higher-status individuals in discussions may shift not only the style but the outcome of these discussions. The most important democratic hope for deliberation is that deliberation, in juries or elsewhere, enhances citizenship by inspiring autonomy and a sense of community; in other words, it produces conditions of mutual respect. Yet again, social hierarchies and patterns of oppression may hamper this goal, afflicting deliberation sufficiently so that participation instills a sense of alienation rather than either autonomy or community. Firsthand accounts by African American jurors in the trial of Robert Chambers (who, before the jury had reached a final verdict, pleaded guilty to first-degree manslaughter in the death of Dawn Levin) reinforce the view that jurors who are privileged in terms of race, economic background, or gender tend to have perspectives quite different from those who are not, belying the expectation that deliberation might inspire, or help recall, a sense of community. The distance between jurors’ perspectives may be sufficient so that less privileged jurors feel that their views are discounted, a possibility clearly not in keeping with the promotion of a sense of autonomy. Robert Nickey was serving on a jury for the third time in the Chambers trial. He testified in the 1988 public hearings of the New York Judicial Commission on Minorities to his belief that his views were systematically unheeded by White jurors. Nickey reported asking the other jurors if they would have any difficulty convicting Chambers of murder with intent if he were Black, and having his inquiry met with silence. He also expressed his disillusionment with the legal system: "I always felt and was taught that justice was blind to race, color, or creed. But that is not so here in New York" (as quoted in Davis 1989, 1569). Indeed, the reactions to the verdict in the Simi Valley trial of the police officers accused of beating Rodney King, and to the criminal trial of O. J. Simpson, reveal a profound distrust of the idea that Americans might resolve their disagreements by resorting to a common ground. Because dominance appears to be a function of status and the attributions of superiority that accompany it, distributing skills and resources for deliberation is unlikely to ensure more egalitarian and democratic discussions. Perhaps more obviously, neither is urging the discovery of a common voice likely to address the problems of inequality in group deliberations. The goal of democratic discussion should not be teaching everyone to deliberate, but trying to figure out a way to make sure that everyone participates and is effectively represented and taken seriously in discussions.

### Fish

#### There is no such thing as free speech – all speech is expressed for a purpose

Fish 98. "There is no such thing as free speech": an interview with Stanley Fish. http://australianhumanitiesreview.org/archive/Issue-February-1998/fish.html

A : Many discussions of free speech, especially by those whom I would call free speech ideologues, begin by assuming as normative the situation in which speech is offered for its own sake, just for the sake of expression. The idea is that free expression, the ability to open up your mouth and deliver an opinion in a seminar-like atmosphere, is the typical situation and any constraint on free expression is therefore a deviation from that typical or normative situation. I begin by saying that this is empirically false, that the prototypical academic situation in which you utter sentences only to solicit sentences in return with no thought of actions being taken, is in fact anomalous. It is something that occurs only in the academy and for a very small number of people. Therefore, a theory of free speech which takes such weightless situations as being the centre of the subject seems to me to go wrong from the first. I begin from the opposite direction. I believe the situation of constraint is the normative one and that the distinctions which are to be made are between differing situations of constraint; rather than a distinction between constraint on the one hand and a condition of no constraint on the other. Another way to put this is to say that, except in a seminar-like situation, when one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. These are the reasons for which speech exists and it is in that sense that I say that there is no such thing as "free speech", that is, speech that has as its rationale nothing more than its own production.

#### Free speech is impossible – there are always expectations about what can and can not be said in order for speech to be possible

Fish 98. "There is no such thing as free speech": an interview with Stanley Fish. http://australianhumanitiesreview.org/archive/Issue-February-1998/fish.html

A : Before I got into the First Amendment or free speech business I was for many years and still am a teacher of English Renaissance poetry and prose, especially that of John Milton. Milton's contribution to the history of the discussion of free speech and censorship is of course the Areopagitica, published in 1643, a vigorous and eloquent protest against a licencing law passed by the parliament. Much of the Areopagitica is a celebration of toleration in matters of expression, for reasons that have now become more familiar to us: the more information the better able are we to choose wisely; the more information the better are we able to exercise our intellects so that they become more refined and perceptive. Another part of Milton's argument is that when something is suppressed it does not go away. It just takes on a romantic underground life and flourishes rather than being brought to the light of day where it might be refuted. All of these are today familiar arguments and components of free speech rhetoric. There is one part, however, of Milton's Areopagitica that is rarely noticed in such discussions and when noticed is noticed with some embarrassment. About three quarters of the way through the tract Milton says, "Now you understand of course", and the tone in his prose suggests that he assumes that most of his readers have always understood this, "that when I speak of toleration and free expression I don't mean Catholics. Them we extirpate".1 Milton's admirers, especially those who have linked him to John Stuart Mill as one of the cornerstones of the free speech tradition, have difficulty with this passage and attempt to explain it away by saying that Milton, because of the limitation of his own historical period, was not able to see what we are able to see. The idea is that our conception of free speech is more capacious, more truly free, than this because we do not have an exclusion up our sleeves, ready to be sprung. But the difference between Milton and us is a difference in what we would exclude from the zone of "free speech", not a difference between exclusion and inclusion. When Milton names Catholic discourse as the exception to his toleration he does so because in his view Catholic speech is subversive of everything speech, in general, is supposed to do -- keep the conversation going, continue the search for Truth. In short, if speech is really to be free in the sense that he desires, Catholics cannot be allowed freely to produce it. This might seem paradoxical, but in fact it is Milton's recognition of a general condition: free speech is what's left over when you have determined which forms of speech cannot be permitted to flourish. The "free speech zone" emerges against the background of what has been excluded. Everyone begins by assuming what shouldn't be said; otherwise there would be no point to saying anything. Another example: one of the foremost proponents of free speech in this country is Nat Hentoff, a journalist well known for his jazz criticism and who has also taken up the cause of free speech no matter how disreputable or offensive the speech in question. But about two years ago he recanted, when he drew the line at campuses allowing certain forms of anti-semitic speech to flourish. Disciples of a certain Muslim group came to campuses and began to talk about "bagel eating vermin who had escaped from caves in the middle ages and were now, as then, infecting the world". Hentoff said this has gone too far. My point is that everyone has such a trigger point, which is either acknowledged at the beginning or emerges in a moment of crisis. There is no-one who believes that everything should be said. Most of us today would not say, "Well, of course, you understand I don't mean toleration of Catholics". But we would say things like, "I don't mean toleration of neo-nazis" or "I don't mean toleration of discourses advocating child molestation". There is no-one in the history of the world who has ever been in favour of free speech.

#### Only demarcations of the field of speech enable discussion

Fish 98. "There is no such thing as free speech": an interview with Stanley Fish. http://australianhumanitiesreview.org/archive/Issue-February-1998/fish.html

A : The silence has to do with the shape of any discourse. As Hobbes brilliantly points out again and again in his Leviathan, thought of a sequential and rational kind can only proceed when some set of stipulated definitions has been put at the beginning and established. Unless you have definitions of your topic, of your subject, demarcations of the field that you are about to explore, you cannot proceed because you have no direction. Hobbes also points out that such stipulative definitions are necessarily exclusionary. They exclude other possibilities, other possible ways of defining the field from which you might then have proceeded; since speech and reasoning can only occur when something is already in place and since the something that is already in place will be in place of something else that could have been in place, that something else which isn't there is the silent background against which the discourse resounds.

#### Only in heaven can there be truly free speech that fulfills its purpose

Fish 98. "There is no such thing as free speech": an interview with Stanley Fish. http://australianhumanitiesreview.org/archive/Issue-February-1998/fish.html

A : That's a wordy way of simply saying that when you talk you're talking in the service of something. In any normal situation you speak for a reason: to inform, to command, to acquiesce, to ask a question, to further an agenda, to close an agenda down. Another way to put this is to say that speech and communication are the signs of our distance from the condition we would most like to inhabit. In paradise or in heaven (I speak here only through report and not direct experience), discursive speech is unnecessary because everyone is already in the place [t]hey or she would desire to be, allied in a perfect and an indistinguishable way with the good. Therefore there is no reason to say anything to anyone; because again the only reason to say something to someone else is to advance both of you in the direction you desire. But in heaven, everyone is at the place of optimal desire so it is imagined in great literature like Milton's Paradise Lost not as a scene of communication, but as a scene of celebration. Heaven's inhabitants express themselves as a chorus all of whose members sing the same song, and sound a note that is repetitive, ritual and ceremonial -- in short a long endless amen or hallelujah. It is only in Heaven that speech is free and spontaneous, because it doesn't mean anything; it doesn't have to mean anything. In this vale of tears, speech means, has a purpose and when we feel this purpose threatened by some of speech's forms, we will always curtail it.

#### Conditions of free speech are nonexistent and undesirable

Fish 98. "There is no such thing as free speech": an interview with Stanley Fish. http://australianhumanitiesreview.org/archive/Issue-February-1998/fish.html

A : The condition of speech being free is not only unrealizable, it is also undesirable. It would be a condition in which speech was offered for no reason whatsoever. Once speech is offered for a reason it is necessarily, if only silently, negating all of the other reasons for which one might have spoken. Therefore the only condition in which free speech would be realizable is if the speech didn't mean anything. Free speech is speech that doesn't mean anything. Once meaning, assertion, predication get into the act the condition of freedom has already been lost and, as I would say, well lost because you want speech to mean something; you don't want to live in a world where people's utterances are weightless -- neither commit to anything, nor illuminate or challenge you in any way. The impossibility of free speech is one of the happy facts of our condition and not a fact to be lamented. There's no such thing as free speech and it's a good thing too.

#### Hate speech is an attempt to tell the truth, making it must be something that’s stopped

Fish 98. "There is no such thing as free speech": an interview with Stanley Fish. http://australianhumanitiesreview.org/archive/Issue-February-1998/fish.html

A : I think Critical Race Theorists are in a difficult position once they accept First Amendment rhetoric and look for a moral high ground from the vantage point of which racist speakers will either be shown the error of their ways or universally condemned. Insofar as critical race theorists buy into liberalism's valorization of rational discourse, they will think that their job is to show that racist speech is irrational and therefore is in some sense not speech at all. But this is to mistake both the nature of the enemy and the strategy for defeating him. Those who utter racist speech (as we call it) would not accept that designation. The people that we think of as racist do not wake up in the morning and say to themselves "Today I'm going to go out and spew racist speech". What they say (and it's exactly what we say) is, "Today I am going to go out and tell the truth." Once you realise that racists don't think of themselves as racists but as tellers of the truth, then you realise that hate speech or racist speech as we designate it is not an anomaly, is not a cognitive mistake, is not a correctable error, is not something that can be diagnosed and therefore cured, but is in fact the rationality and truth telling of a vision we happen to despise. The correct response to a vision or a morality that you despise is not to try and cure it or to make its adherents sit down and read John Stuart Mill's On Liberty, that's not going to do the job. The only way to fight hate speech or racist speech is to recognize it as the speech of your enemy and what you do in response to the speech of your enemy is not prescribe a medication for it but attempt to stamp it out. So long as Critical Race Theory and others fall into the liberal universalist assumption of regarding hate speech as some kind of anomaly which could be recognized as such by everyone, they're going to lose the game. They will win the game only if they really try to win it, rather than falling in with Justice Brandeis' pronouncement that "Sunshine is the best disinfectant". This bromide flies in the face of all recorded history which tells us that forms of speech, once they get into circulation, do not wither away in the light of day; rather they attract the attention of some hearers, and begin to circulate in a more effective way. I know that this is heresy in the liberal discourse to which we all are, in some sense, committed. But it seems to me that I must agree with the American politician and journalist, Pat Buchanan, who once said, "If you can pollute the physical environment, you can pollute the cultural and mental environment".

### Fish

#### The constitutive nature of hate speech undermines the dignity and freedom of minorities to be respected members of society

Fish summarizes Waldron, Stanley. The Harm in Free Speech. JUNE 4, 2012. NP 1/15/17.

Jeremy Waldron’s new book, “The Harm in Hate Speech,” might well be called “The Harm in Free Speech”; for Waldron, a professor of law and political theory at New York University and Oxford, argues that the expansive First Amendment we now possess allows the flourishing of harms a well-ordered society ought not permit. Waldron is especially concerned with the harm done by hate speech to the dignity of those who are its object. He is careful to distinguish “dignity harms” from the hurt feelings one might experience in the face of speech that offends. Offense can be given by almost any speech act — in particular circumstances one might offend by saying “hello” — and Waldron agrees with those who say that regulating offensive speech is a bad and unworkable idea. But harms to dignity, he contends, involve more than the giving of offense. They involve undermining a public good, which he identifies as the “implicit assurance” extended to every citizen that while his beliefs and allegiance may be criticized and rejected by some of his fellow citizens, [s]he will nevertheless be viewed, even by his polemical opponents, as someone who has an equal right to membership in the society. It is the assurance — not given explicitly at the beginning of each day but built into the community’s mode of self-presentation — that [s]he belongs, that he is the undoubted bearer of a dignity he doesn’t have to struggle for. Waldron’s thesis is that hate speech assaults that dignity by taking away that assurance. The very point of hate speech, he says, “is to negate the implicit assurance that a society offers to the members of vulnerable groups — that they are accepted … as a matter of course, along with everyone else.” Purveyors of hate “aim to undermine this assurance, call it in question, and taint it with visible expressions of hatred, exclusion and contempt.” “Visible” is the key word. It is the visibility of leaflets, signs and pamphlets asserting that the group you belong to is un-American, unworthy of respect, and should go back where it came from that does the damage, even if you, as an individual, are not a specific target. “In its published, posted or pasted-up form, hate speech can become a world-defining activity, and those who promulgate it know very well — this is part of their intention — that the visible world they create is a much harder world for the targets of their hatred to live in.” (Appearances count.) Even though hate speech is characterized by First Amendment absolutists as a private act of expression that should be protected from government controls and sanctions, Waldron insists that “hate speech and defamation are actions performed in public, with a public orientation, aimed at undermining public goods.” That undermining is not accomplished by any particular instance of hate speech. But just as innumerable individual automobile emissions can pollute the air, so can innumerable expressions of supposedly private hate combine to “produce a large-scale toxic effect” that operates as a “slow-acting poison.” And since what is being poisoned is the well of public life, “it is natural,” says Waldron, “to think that the law should be involved — both in its ability to underpin the provision of public goods and in its ability to express and communicate common commitments.” After all, he reminds us, “Societies do not become well ordered by magic.” Waldron observes that legal attention to large-scale structural, as opposed to individual, harms is a feature of most other Western societies, which, unlike the United States, have hate speech regulations on their books. He finds it “odd and disturbing that older and cruder models remain dominant in the First Amendment arena.” But as he well knows, it is not so odd within the perspective of current First Amendment rhetoric, which is militantly libertarian, protective of the individual’s right of self-assertion no matter what is being asserted, and indifferent (relatively) to the effects speech freely uttered might have on the fabric of society. It was not always thus. At one time, both the content and effects of speech were taken into account when the issue of regulation was raised. Is this the kind of speech we want our children to see and hear? Are the effects of certain forms of speech so distressing and potentially dangerous that we should take steps to curtail them? Is this form of speech a contribution to the search for truth? Does it have a redeeming social value? Since New York Times v. Sullivan (1964) these questions, which assess speech in terms of the impact it has in the world, have been replaced by a simpler question — is it speech? — that reflects a commitment to speech as an almost sacrosanct activity. If the answer to that question is “yes,” the presumption is that it should be protected, even though the harms it produces have been documented. Waldron wants to bring back the focus on those harms and restore the reputation of Beauharnais v. Illinois (1952), in which the Supreme Court upheld a group libel law. The case turned on the conviction of a man who had distributed leaflets warning Chicagoans to be alert to the dangers of mongrelization and rape that will surely materialize, he claimed, if white people do not unite against the Negro. Speaking for the majority, Justice Felix Frankfurter wrote that “a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial group to which he willy-nilly belongs as on his own merit.” With the phrase “on his own merit,” Frankfurter gestures toward the view of dignity he is rejecting, the view in which dignity wells up from the inside of a man (or woman) and depends on an inner strength that asserts itself no matter how adverse or hostile external circumstances may be, including the circumstance in which the individual is confronted with signs, posters and pamphlets demeaning his race or ethnic origin or religion or sexual preference. In this picture, the responsibility for maintaining dignity rests with the individual and not with any state duty to devise rules and regulations to protect it. Some who take this position argue that if the individual feels victimized by expressions of hate directed at the group to which he “willy-nilly” belongs, that is his or her own choice. Waldron’s example is C. Edwin Baker (“Harm, Liberty and Free Speech,” Southern California Law Review, 1997), who writes: “A speaker’s racial epithet … harms the hearer only through her understanding of the message … and [harm] occurs only to the extent that the hearer (mentally) responds one way rather than another, for example, as a victim rather than as a critic of the speaker.” In this classic instance of blaming the victim, the fault lies with a failure of resolve; self-respect was just not strong enough to rise to the occasion in a positive way. Waldron calls this position “silly” (it is the majority’s position in Plessy v. Ferguson) and points out that it mandates and celebrates a harm by requiring victims of hate speech to grin and bear it: “It should not be necessary,” he declares, “for [hate speech victims] to laboriously conjure up the courage to go out and try to flourish in what is now presented to them as a … hostile environment.” The damage, Waldron explains, is already done by the speech “in requiring its targets to resort to the sort of mental mediation that Baker recommends.” To the extent that those targets are put on the defensive, “racist speech has already succeeded in one of its destructive aims.” Notice that here (and elsewhere in the book), Waldron refuses to distinguish sharply between harm and representation. In the tradition he opposes, harm or hurt is physically defined; one can be discomforted and offended by speech; but something more than speech or image is required for there to be genuine (and legally relevant) damage. After all, “sticks and stones will break my bones, but names will never hurt me.” No, says Waldron (and here he follows Catharine MacKinnon’s argument about pornography), the speech is the damage: “[T]he harms emphasized in this book are often harms constituted by speech rather than merely caused by speech.” If the claim were that the harm is caused by speech, there would be room to challenge the finding by pointing to the many intervening variables that break or complicate the chain of causality. But there is no chain to break if harm is done the moment hate speech is produced. “The harm is the dispelling of assurance, and the dispelling of assurance is the speech act.” Waldron knows that the underlying strategy of those he writes against is to elevate the status of expression to an ultimate good and at the same time either deny the harm – the statistics are inconclusive; the claims cannot be proved — or minimize it in relation to the threat regulation poses to free expression. If “free speech trumps any consideration of social harm … almost any showing of harm resulting from hate speech … will be insufficient to justify restrictions on free speech of the kind that we are talking about.” In short, the game is over before it begins if your opponent can be counted on to say that either there is no demonstrated harm or, no matter how much harm there may be, it will not be enough to justify restrictions on speech. If that’s what you’re up against, there is not much you can do except point out the categorical intransigence of the position and offer an (unflattering) explanation of it. Waldron’s explanation is that the position is formulated and presented as an admirable act of unflinching moral heroism by white liberal law professors who say loudly and often that we must tolerate speech we find hateful. Easy to say from the protected perch of a faculty study, where the harm being talked about is theoretical and not experienced. But what about the harm done “to the groups who are denounced or bestialized in pamphlets, billboards, talk radio and blogs? … Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled in a social environment polluted by those materials”? Waldron answers “no,” and he challenges society and its legal system to do something about it. But the likelihood that something will be done is slim if Waldron is right about the state of First Amendment discourse: “[I]n the American debate, the philosophical arguments about hate speech are knee-jerk, impulsive and thoughtless.” Not the arguments of this book, however; they hit the mark every time. 218COMMENTS

### Wilson & Brekke

Wilson and Brekke 94. Timothy D. Wilson and Nancy Brekke. *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations.* Psychological Bulletin, 1994, Vol. 116, No. 1, 117-142. NP 1/17/17.

### More Fish

#### Valorizing individual rights without taking into account historical injustices sanitizes inequality and prevents recognition of the ends that the establishment of rights aims to pursue

Fish 94, Stanley Eugene. There's No Such Thing As Free Speech : And It's a Good Thing, Too. New York: Oxford University Press, 1994. eBook Collection (EBSCOhost), EBSCOhost (accessed January 16, 2017). NP

The sleight-of-hand logic that first abstracts events from history and thenassesses them from behind a veil of willed ignorance gains some of itsplausibility from another key word in the anti-affirmative action lexicon. That word is "individual," as in "the American way is to focus on the rights of individuals rather than groups." Now individual and individualism have been honorable words in the American political vocabulary, and theyhave often been well employed in the fight against various tyrannies. Butl ike any other word or concept, individualism can be perverted and twisted to serve ends the opposite of those it originally served, and this is what has happened when, in the name of individualism, indeed in the name of indi-vidual rights, millions of individuals are enjoined from redressing histori-cally documented wrongs. How is this managed? Largely in the same waythat the invocation of fairness is used to legitimize an institutionalized in-equality. First you say, in the most solemn of tones, that the protection ofindividual rights is the chief obligation of society and its institutions; and then you define individuals as souls sent into the world with equal entitle-ments as guaranteed either by their Creator or by the Constitution; and then you pretend that nothing has happened to them since they stepped onto the world's stage; and then you say of these carefully denatured souls that theywill all be treated in the same way, irrespective of any of the differences that history has produced. Bizarre as it may seem, individualism in this argument turns out to mean that everyone is or should be the same, and a recent letter to the Atlantic magazine makes the point with a brilliant (ifinadvertent) clarity. "I believe," the correspondent says, "it is time to stop insisting to black students that they are different. It is time to let them geton with their studies and with living as individuals in society, like everyoneelse" (emphasis mine) (July 1992, 8). It is fitting (if merely serendipitous) that the man who thinks that being an individual requires you to be indistinguishable from your fellows is named Smith. (How about a new movie, Mr. Smith Says No to Multiculturalism?) This dismissal of individual dif-ference in the name of the individual would be funny were its consequencesnot so serious; for it is the mechanism by which imbalances and inequities suffered by millions of people through no fault of their own can be sanitized and even celebrated as the natural workings of unfettered democracy.

#### Your claims are media hype not based in fact – the left has not cracked down on teachers nor suppressed diverging viewpoints – prefer empirical evidence.

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First, as a matter of fact, the picture of a campus world seized by a radically politicized left professoriate that has trashed the traditional curriculum and terrorized its ideological opponents in ways reminiscent of Senator McCarthy is simply unsupported by the evidence. In a recent cover story, Time magazine, no friend to progressive trends in the academy, declared this highly polemical picture of academic life "flatly absurd." It asserted, the comparison to McCarthyism could only be made by people who either don't know or don't wish to remember what the senator from Wisconsin and his pals actually did . . . the firing of campus professors in mid-career, the inquisitions by the House Un-American Activities Committee on the content of libraries and courses, the campus loyalty oaths, the whole sordid atmosphere of persecution, betrayal and paranoia. The number of conservative academics fired by the left thought police is, by contrast, zero. (Robert Hughes, Feb. 3, 1992, p. 46) Time's judgment is backed up by every survey that has been conducted, by surveys that reveal a remarkable stability in the curriculum, by surveys that reveal a professoriate still from 80 to 90 percent male and white, by surveys that show 97 percent of colleges reporting no undue pressure on conservative scholars and teachers. This general finding can be further substantiated by the facts about the English department at Duke, which has been offered by Mr. D'Souza and others as the very symbol of what has gone wrong; I say flatly that there is no relationship whatsoever between the media characterization of that department and the reality of its day-today life, and I am prepared to back up that statement with massive documentation

#### Fairness can not be the basis for a political theory; pluralism means that policies can only redistribute, rather than eliminate, unfairness

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But why not devise plans and policies that have no casualties, policies that are fair to everyone? The answer is that there is not and could not be such a policy because fairness is itself a contestable concept and will be differently defined depending on what assumptions inform those who bran-dish it as a measure. Fairness for everyone would be possible only if every-one's interests were the same, if everyone were in agreement as to what baseline considerations must be in place for a procedure to be labeled "fair." But if that were the case, the question of fairness would never be raised. It is raised precisely because everyone's interests are not the same, and since different interests will generate different notions of fairness (the debate be-tween those who call for equality of access and those who call for equality of opportunity is an example), any regime of fairness will always be unfair in the eyes of those for whom it was not designed. A change in design will not produce less unfairness but unfairness differently directed. The amount of unfairness in the world can never be eliminated or even diminished; it can only be redistributed as in the course of political struggle one angled formulation of what it means to be equitable gives way to another.

#### Discrimination must be fought with discrimination

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That is why, as the title of this chapter asserts, you can only fight dis-crimination with discrimination. The usual wisdom is to proclaim exactly the reverse and require remedies for discrimination to be rigorously non dis-criminatory in their turn. If an admissions policy is found to be discriminatory, one corrects it according to this argument, not by tilting the balance in the other direction, but by purging it of any tendency to take considerations of race, gender, ethnic origin, economic class, and so on into account. What remains will be a policy responsive only to considerations of merit. As compelling as this reasoning may seem, however, it founders on the fact that before a policy of such purity can even be conceived (never mind implemented), one would have to specify exactly what a consideration of merit is, and any specification one comes up with will be challengeable and(potentially) controversial. Merit, like fairness, is a contested concept; as a measure it is itself derived from a particular view of what is worthy and indispensable, and because that view is partial—that is what it means to be a view—so is the measure of merit it generates. Suppose, for example, a decision between two job candidates were to turn in part on the fact that one is a woman. Wouldn't that be a case in which merit will have been compromised in favor of extraneous factors? My answer is "no." Merit will not have been compromised but reconceived in relation to an alternative measure; for if it is your judgment (as it is mine) that the presence of women in a department makes a difference—in the number and kinds of voices heard, in the perspectives that enrich the conversation, in the general feel of the workplace—and if you value that difference and put it into play by factoring gender into your decision, you will be acting in accordance with your notion of merit, a notion that will seem distressing and even bizarre to those for whom the measure of merit is a quantity of publications, or familiarity with literary theory, or, in some places, ignorance of literary theory. Once the measure of merit relative to a particular practice has been established (if only temporarily), those who would have been judged meritorious under another measure will believe, and believe correctly, that they have been the victims of discrimination. Any regime of merit, like any regime of fairness, will be a form of discrimination; moreover, any effort to redress the effects of discrimination will only reinstitute discrimination as its unsought-for but inevitable by-product.

#### All expression privileges some speech and discriminate against other perspectives

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The demand that discrimination be eliminated entirely is finally the demand that we live outside (or above or to the side of) the varied and conflicting perspectives that give to each of us a world saturated with goods, goals, aspirations, and obligations. It is the demand that we no longer be human beings—beings defined by partiality—but become as gods, beings who know no particular time or place. This is the dream not only of philosophy but of theology (in relation to whose assumptions it at least makes sense), but until we are the beneficiaries of a revelation or of a god who descends to begin his reign on earth, it must remain just that, a dream, and we will continue to be confined within the traditions and histories that generate our differing senses of what is true and good and worth dying for. To put it another way, each of us lives in a narrative, a story in which we are at once characters and the tellers. No one's story is the whole story, and in the various lights shed by our various stories, different truths will seem self-evident and different courses of action will seem obviously called for. Those we now criticize as racists, those who in the nineteenth century and for the first sixty years of the twentieth argued for second-class citizenship and segregated facilities and limited access to the ballot box, did not think of themselves as evil persons pursuing evil policies; they thought of them-selves as right, and from the vantage point of the story they were living and telling—a story I find unpersuasive and repellent—they were. In the years since 1960, that story has become less and less compelling to more and more people, which means not that its limitations have been transcended but that another story, with its own limitations, has become more compelling. The effect of telling that newer story has not been to eliminate partiality but to alter its shape, so that while the old story strongly recognized and validated some facts and de-emphasized some others, the new story recognizes and validates a different set of facts and in so doing necessarily slights facts to which the inhabitants of alternative stories cling for dear life. The conclusion is perhaps distressing—especially if you are holding out for a vision rooted in no story but in the Whole Truth as seen by the eyes of God—but it is inevitable: alternative stories are alternative vehicles of discrimination, alternative narratives in which some interests are slighted at the expense of others. No agenda operates (or can even be conceived) that does not privilege some concerns and turn a hostile or blind eye to some others, and what follows from that conclusion is the even more distressing conclusion that you can only fight discrimination—dislodge one story whose telling has consequences you don't like—by discriminating, that is, by put-ting another story whose consequences someone else won't like in its place.

A2 ACLU

#### Hate speech is a historical question, meaning that there are slurs that constitute hate speech against whites, males, etc. -- Stanford proves

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Consider, for example, the vexed issue of hate speech on campus. It is often said that the logic of speech codes would require the disciplining of those who spoke scornfully of whites and males and even Nazis as well as the disciplining of those who spoke scornfully of blacks, women, and gays; for after all, if the rule is that one should not discriminate, are not all acts of discrimination equal? The answer, I think, is no, because discrimination is not a problem in logic but a problem in historical fact, and it is a fact about discrimination that it is usually practiced by the powerful at the expense of the relatively powerless. The point has been made by Thomas Grey, professor of law at Stanford and a principal author of that university's code. Grey acknowledges that under the provisions of the Stanford code, calling a black student [the n word]"nigger" would constitute harassment, but calling a white student "white trash" would not. The reasoning is that since in our society whiteness is the norm, not only statistically (and that, of course, may change) but more importantly in the sense that normative values are understood to be derived from a white Anglo-Saxon history, "there are no epithets in this society at this time that are 'commonly understood' to con-vey hatred and contempt for whites as such." This is so because the common understanding has been fashioned by and for whites, and therefore any epithet denigrating them would be "commonly" regarded as a mistake, something not to be taken seriously. In contrast, insults directed at tradi-tionally persecuted or disadvantaged groups draw their capacity to impose the characteristic civil-rights injury to "hearts and minds" from the fact that they turn the whole socially and historically inculcated weight of ... prejudices upon their victim. Each hatemonger who invokes each of these terms summons a vicious chorus in his support. It is because, given our cultural history, no such general prejudices strike against the dominant groups that there exist no comparable terms of universally understood hatred and con-tempt applicable to whites, males and heterosexuals as such.

#### T – misappropriations of hate codes will obviously be repealed/lead to backlash – this fosters important discussions about how reverse racism is not real/how to discuss race in the real world

#### Criticisms of political correctness presume the possibility of a view from nowhere, which can not exist – all speech is partial

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These days you cannot mention politics without calling up the specter of" political correctness." "Politically correct" is a dismissive accusation that only makes sense if it is opposed to a superior alternative. Presumably, what is deficient about "political correctness" is that its judgments of right and wrong are made from an angle, from a site of interest, from a position colored by partisan desires. Really correct correctness, on the other hand, would proceed from no angle, no interest, no partisan desire, but from the perspective of truth. The trouble with this requirement, however, is that no human being could meet it because no human being sees truth directly, stands to the side of interest, sees by more than partisan lights. There is no really correct correctness, at least not any we can validate by standards that are themselves not political. "Political correctness" is simply a pejorative term for the condition of operating on the basis of a partial vision, and since that is the condition of all of us, we are all politically correct. To be sure, we are not all politically correct in the same way; the products of different histories, we are all committed to truths, but to truths perpetually in dispute. That is what it means to be partial, or, in an older and preferable vocabulary, fallen. It is with that same vocabulary in mind that I would propose an emendation, the substitution for "politically correct" of the more accurate phrase "faithfully correct," correct from the vantage point of the different faiths we involuntarily inhabit. We are all faithfully correct, true to the convictions that now grasp us and open to the possibility that in the fullness of time we may be grasped by better convictions. This is at once our infirmity and our glory. It is our infirmity because it keeps us from eternity, and it is our glory because it sends us in search of eternity and keeps us from premature rest.

#### The idea of counterspeech sorely misunderstands the problem – targeted minorities have little organizational power to challenge problematic speech

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Second, this small minority, far from being organized and equipped with a police force, is internally self-divided and politically ineffective. The truly political organization is in the hands of neoconservative ideologues who enjoy incredible levels of funding from right-wing foundations—$700,000a year to the National Association of Scholars alone; who are able to callon the pens of a cadre of fellow-traveling journalists with national audi-ences—George Will, Cal Thomas, John Leo, among many others; and who can rely on the encouragement and support of highly placed government officials—Lynne Cheney, Henry Hyde, William Bennett, Lamar Alexan-der, and, on occasion, George Bush. This is real political power and real political correctness, when an agenda has behind it the triple threat of money, media domination, and governmental regulation. The best evidence of this power has been the ability of this highly political agenda to tag its opponents with the label "political" even as it outspends, out propagandizes, and outpoliticks them. As even Time magazine has recently acknowledged ,no conservative faculty member has been hounded out of university life or forced to alter the content of a course by administrative pressure, where ason several campuses pressures brought to bear on administrators by forces on the right have led to the suspension of programs and to the chilling effects of which those same forces shamelessly complain.

#### I like this.

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**Nowadays the First Amendment is the First Refuge of Scoundrels.**

#### Freedom of expression can only exist against a background of limitations on speech

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I want to say that all affirmations of freedom of expression are like Mil-ton's, dependent for their force on an exception that literally carves out the space in which expression can then emerge. I do not mean that expression (saying something) is a realm whose integrity is sometimes compromised by certain restrictions but that restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without restriction, without an inbuilt sense of what it would be meaningless to say or wrong to say, there could be no assertion and no reason for asserting it. The exception to unregulated expression is not a negative restriction but a positive hollowing out of value—we are for this, which means we are against that—in relation to which meaningful assertion can then occur. It is in reference to that value—constituted as all values are by an act of exclusion—that some forms of speech will be heard as (quite literally) intolerable. Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict. When the pinch comes (and sooner or later it will always come)and the institution (be it church, state, or university) is confronted by behavior subversive of its core rationale, it will respond by declaring "of course we mean not tolerated , that we extirpate," not because an exception to a general freedom has suddenly and contradictorily been announced, but because the freedom has never been general and has always been understood against the background of an originary exclusion that gives it meaning.

#### In attempting to distinguish speech from action, the First Amendment is incoherent

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106 / There's No Such Thing as Free Speech The trouble with this definition is that it distinguishes not between fight-ing words and words that remain safely and merely expressive but between words that are provocative to one group (the group that falls under therubric "average person") and words that might be provocative to other groups, groups of persons not now considered average. And if you ask what words are likely to be provocative to those non average groups, what are likely to be their fighting words, the answer is anything and everything, for as Justice Holmes said long ago (in Gitlow v. New York), every idea is an incitement to somebody, and since ideas come packaged in sentences, in words, every sentence is potentially, in some situation that might occur tomorrow, a fighting word and therefore a candidate for regulation. This insight cuts two ways. One could conclude from it that the fighting words exception is a bad idea because there is no way to prevent clever and unscrupulous advocates from shoveling so many forms of speech into the excepted category that the zone of constitutionally protected speech shrinks to nothing and is finally without inhabitants. Or, alternatively, one could conclude that there was never anything in the zone in the first place and that the difficulty of limiting the fighting words exception is merely a particular instance of the general difficulty of separating speech from action. And if one opts for this second conclusion, as I do, then a further conclusion is inescapable: insofar as the point of the First Amendment is to identify speech separable from conduct and from the consequences that come in conduct's wake, there is no such speech and therefore nothing for the First Amendment to protect. Or, to make the point from the other direction, when a court invalidates legislation because it infringes on protected speech, it is not because the speech in question is without consequences but because the consequences have been discounted in relation to a good that is judged to outweigh them. Despite what they say, courts are never in the business of protecting speech per se, "mere" speech (a nonexistent animal); rather, they are in the business of classifying speech (as protected or regulatable) in relation to a value—the health of the republic, the vigor of the economy, the maintenance of the status quo, the undoing of the status quo—that is the true, if unacknowledged, object of their protection

#### Freedom of speech can not be a primary value – it only matters if it’s instrumental to some external end

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But if this is the case, a First Amendment purist might reply, why not drop the charade along with the malleable distinctions that make it possible, and declare up front that total freedom of speech is our primary value and trumps anything else, no matter what? The answer is that freedom of expression would only be a primary value if it didn't matter what was said, didn't matter in the sense that no one gave a damn but just liked to hear talk. There are contexts like that, a Hyde Park corner or a call-in talk show where people get to sound off for the sheer fun of it. These, however, are special contexts, artificially bounded spaces designed to assure that talking is not taken seriously. In ordinary contexts, talk is produced with the goal of trying to move the world in one direction rather than another. In these contexts—the contexts of everyday life—you go to the trouble of asserting that X is Y only because you suspect that some people are wrongly assert-ing that X is Z or that X doesn't exist. You assert, in short, because you give a damn, not about assertion—as if it were a value in and of itself—but about what your assertion is about. It may seem paradoxical, but free expression could only be a primary value if what you are valuing is the right to make noise; but if you are engaged in some purposive activity in the course of which speech happens to be produced, sooner or later you will come to a point when you decide that some forms of speech do not further but endanger that purpose.

#### The idea of a university’s function as encouragement of free expression undermines

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Take the case of universities and colleges. Could it be the purpose of such places to encourage free expression? If the answer were "yes," it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines, or libraries, since freedom of expression requires nothing but a soapbox or an open telephone line. The very fact of the university's machinery—of the events, rituals, and procedures that fill its calendar—argues for some other, more substantive purpose. In relation to that purpose (which will be realized differently in different kinds of institutions), the flourishing of free expression will in almost all circumstances be an obvious good; but in some circumstances, freedom of expression may pose a threat to that purpose, and at that point it may be necessary to discipline or regulate speech, lest, to paraphrase Milton, the institution sacrifice itself to one of its accidental features.

#### For speech to be intelligible and have any moral significance it must be carved out against a background of limitation

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The objection to this line of reasoning is well known and has recently been reformulated by Benno Schmidt, former president of Yale University. According to Schmidt, speech codes on campuses constitute "well intentioned but misguided efforts to give values of community and harmony a higher place than freedom" (Wall Street Journal, May 6, 1991). "When the goals of harmony collide with freedom of expression," he continues, “freedom must be the paramount obligation of an academic community. "The flaw in this logic is on display in the phrase "academic community, "for the phrase recognizes what Schmidt would deny, that expression only occurs in communities—if not in an academic community, then in a shop-ping mall community or a dinner party community or an airplane ride com-munity or an office community. In these communities and in any others that could be imagined (with the possible exception of a community of major league baseball fans), limitations on speech in relation to a defining and deeply assumed purpose are inseparable from community membership. Indeed, "limitations" is the wrong word because it suggests that expres-sion, as an activity and a value, has a pure form that is always in danger of being compromised by the urgings of special interest communities; but independently of a community context informed by interest (that is, pur-pose), expression would be at once inconceivable and unintelligible. Rather than being a value that is threatened by limitations and constraints, expres-sion, in any form worth worrying about, is a product of limitations and constraints, of the already-in-place presuppositions that give assertions their very particular point. Indeed, the very act of thinking of something to say(whether or not it is subsequently regulated) is already constrained—rendered impure, and because impure, communicable—by the background context within which the thought takes its shape. (The analysis holds too for "freedom," which in Schmidt's vision is an entirely empty concept referring to an urge without direction. But like expression, freedom is a coherent notion only in relation to a goal or good that limits and, by limit-ing, shapes its exercise.)

#### Affirmation of the unconditional right to free speech is an abstraction devoid from acknowledgment of materiality

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Arguments like Schmidt's only get their purchase by first imagining speech as occurring in no context whatsoever, and then stripping particular speech acts of the properties conferred on them by contexts. The trick is nicely illustrated when Schmidt urges protection for speech "no matter how ob-noxious in content." "Obnoxious" at once acknowledges the reality of speech-related harms and trivializes them by suggesting that they are sur-face injuries that any large-minded ("liberated and humane") person should be able to bear. The possibility that speech-related injuries may be grievous and deeply wounding is carefully kept out of sight, and because it is kept out of sight, the fiction of a world of weightless verbal exchange can be maintained, at least within the confines of Schmidt's carefully denatured discourse.

#### Defense of counter speech forever defers action against it and puts trust in the world which you condemn

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To this Schmidt would no doubt reply, as he does in his essay, that harmful speech should be answered not by regulation but by more speech; but that would make sense only if the effects of speech could be canceled out by additional speech, only if the pain and humiliation caused by racial or religious epithets could be ameliorated by saying something like "So's your old man." What Schmidt fails to realize at every level of his arguments that expression is more than a matter of proffering and receiving propositions, that words do work in the world of a kind that cannot be confined to a purely cognitive realm of "mere" ideas. It could be said, however, that I myself mistake the nature of the work done by freely tolerated speech because I am too focused on short-run out-comes and fail to understand that the good effects of speech will be realized, not in the present, but in a future whose emergence regulation could only inhibit. This line of reasoning would also weaken one of my key points, that speech in and of itself cannot be a value and is only worth worrying about if it is in the service of something with which it cannot be identical. My mistake, one could argue, is to equate the something in whose service speech is with some locally espoused value (e.g., the end of racism, the empowerment of disadvantaged minorities), whereas in fact we should think of that something as a now-inchoate shape that will be given firm lines only by time's pencil. That is why the shape now receives such indeterminate characterizations (e.g., true self-fulfillment, a more perfect polity, a more capable citizenry, a less partial truth); we cannot now know it, and there-fore we must not prematurely fix it in ways that will bind successive generations to error. This forward-looking view of what the First Amendment protects has a great appeal, in part because it continues in a secular form the Puritan celebration of millenarian hopes, but it imposes a requirement so severe that one would except more justification for it than is usually provided. **The requirement is that we endure whatever pain racist and hate speech inflicts for the sake of a future whose emergence we can only take on faith.** In a specifically religious vision like Milton's, this makes perfect sense (it is indeed the whole of Christianity), but in the context of a politics that puts its trust in the world and not in the Holy Spirit, it raises more questions than it answers and could be seen as the second of two strategies designed to delegitimize the complaints of victimized groups. The first strategy, as I have noted, is to define speech in such a way as to render it inconsequential(on the model of "sticks and stones will break my bones, but . . ."); the second strategy is to acknowledge the (often grievous) consequences of speech but declare that we must suffer them in the name of something that cannot be named. The two strategies are denials from slightly different directions of the present effects of racist speech; one confines those effects to a closed and safe realm of pure mental activity; the other imagines the effects of speech spilling over into the world but only in an ever-receding future for whose sake we must forever defer taking action.

#### The first amendment is a political tool of power – it can never be neutral

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find both strategies unpersuasive, but my own skepticism concerning them is less important than the fact that in general they seem to have worked; in the parlance of the marketplace (a parlance First Amendment commen-tators love), many in the society seemed to have bought them. Why? The answer, 1 think, is that people cling to First Amendment pieties because they do not wish to face what they correctly take to be the alternative. That alternative is politics, the realization (at which I have already hinted) that decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want heard and the regulation of speech they want silenced. (That is how George Bush can argue for flag-burning statutes and against campus hate-speech codes.) When the First Amendment is successfully invoked, the result is not a victory for free speech in the face of a challenge from politics but a political victory won by the party that has managed to wrap its agenda in the mantle of free speech.

#### The constitution is not independently interpretable – it’s always a tool of power, influenced by political struggles

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It is from just such a conclusion—a conclusion that would put politics inside the First Amendment—that commentators recoil, saying things like “This could render the First Amendment a dead letter," or "This would leave us with no normative guidance in determining when and what speech to protect," or "This effaces the distinction between speech and action, “or "This is incompatible with any viable notion of freedom of expression. “To these statements (culled more or less at random from recent law review pieces) I would reply that the First Amendment has always been a dead letter if one understood its "liveness" to depend on the identification and protection of a realm of "mere" expression distinct from the realm of regulatable conduct; the distinction between speech and action has always been effaced in principle, although in practice it can take whatever form the prevailing political conditions mandate; we have never had any normative guidance for marking off protected from unprotected speech; rather, the guidance we have has been fashioned (and refashioned) in the very political struggles over which it then (for a time) presides. In short, the name of the game has always been politics, even when (indeed, especially when) it is played by stigmatizing politics as the area to be avoided.

#### Abstraction about the goodness of freedom of speech and expression prevent pragmatic discussions of the specifities of speech in a given instance//pragmatism offense???

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In saying this, I would not be heard as arguing either for or against regulation and speech codes as a matter of general principle. Instead my argument turns away from general principle to the pragmatic (anti)principle of considering each situation as it emerges. The question of whether or not to regulate will always be a local one, and we can not rely on abstractions that are either empty of content or filled with the content of some partisan agenda to generate a "principled" answer. Instead we must consider in every case what is at stake and what are the risks and gains of alternative courses of action. In the course of this consideration many things will be of help, but among them will not be phrases like "freedom of speech" or “the right of individual expression," because, as they are used now, these phrases tend to obscure rather than clarify our dilemmas. Once they are deprived of their talismanic force, once it is no longer strategically effective simply to invoke them in the act of walking away from a problem, the conversation could continue in directions that are now blocked by a First Amendment absolutism that has only been honored in the breach anyway. To the student reporter who complains that in the wake of the promulgation of a speech code at the University of Wisconsin there is now something in the back of his mind as he writes, one could reply, "There was always something in the back of your mind, and perhaps it might be better to have this code in the back of your mind than whatever was in there before. “And when someone warns about the slippery slope and predicts mournfully that if you restrict one form of speech, you never know what will be re-stricted next, one could reply, "Some form of speech is always being re-stricted, else there could be no meaningful assertion; we have always and already slid down the slippery slope; someone is always going to be re-stricted next, and it is your job to make sure that the someone is not you. “And when someone observes, as someone surely will, that antiharassment codes chill speech, one could reply that since speech only becomes intelli-gible against the background of what isn't being said, the background of what has already been silenced, the only question is the political one of which speech is going to be chilled, and, all things considered, it seems a good thing to chill speech like "nigger," "cunt," "kike," and "faggot." And if someone then says, "But what happened to free-speech principles?" one could say what I have now said a dozen times, free-speech principles don't exist except as a component in a bad argument in which such principles are invoked to mask motives that would not withstand close scrutiny.

#### We should not wait for a moral revelation about truth – we should act based on our current inclinations about legitimate action//a2 pragmatism

Fish 94, Stanley Eugene. There's No Such Thing As Free Speech : And It's a Good Thing, Too. New York: Oxford University Press, 1994. eBook Collection (EBSCOhost), EBSCOhost (accessed January 16, 2017). NP

What I find most distressing about this incident is not that the ad was printed but that it was printed by persons who believed it to be a lie and a distortion. If the editor and her staff were in agreement with Smith's views or harbored serious doubts about the reality of the Holocaust, I would still have a quarrel with them, but it would be a different quarrel; it would be a quarrel about evidence, credibility, documentation. But since on these matters the editors and I are in agreement, my quarrel is with the reasoning that led them to act in opposition to what they believed to be true. That reasoning, as I understand it, goes as follows: although we ourselves are certain that the Holocaust was a fact, facts are notoriously interpretable and disputable; therefore nothing is ever really settled, and we have no right to reject something just because we regard it as pernicious and false. But the fact—if I can use that word—that settled truths can always be upset, at least theoretically, does not mean that we cannot affirm and rely on truths that according to our present lights seem indisputable; rather, it means exactly the opposite: in the absence of absolute certainty of the kind that can only be provided by revelation (something I do not rule out but have not yet experienced), we must act on the basis of the certainty we have so far achieved. Truth may, as Milton said, always be in the course of emerging, and we must always be on guard against being so beguiled by its present shape that we ignore contrary evidence; but, by the same token, when it happens that the present shape of truth is compelling beyond a reasonable doubt, it is our moral obligation to act on it and not defer action in the name of an interpretative future that may never arrive. By running the First Amendment up the nearest flagpole and rushing to salute it, the student editors defaulted on that obligation and gave over their responsibility to a so-called principle that was not even to the point.

#### First Amendment principles should not be the reference point for free speech regulation

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Let me be clear. I am not saying that First Amendment principles are inherently bad (they are inherently nothing), only that they are not always the appropriate reference point for situations involving the production of speech, and that even when they are the appropriate reference point, they do not constitute a politics-free perspective because the shape in which they are invoked will always be political, will always, that is, be the result of having drawn the relevant line (between speech and action, or between high-value speech and low-value speech, or between words essential to the expression of ideas and fighting words) in a way that is favorable to some interests and indifferent or hostile to others. This having been said, the moral is not that First Amendment talk should be abandoned, for even if the standard First Amendment formulas do not and could not perform the function expected of them (the elimination of political considerations indecisions about speech), they still serve a function that is not at all negligible: they slow down outcomes in an area in which the fear of over hasty outcomes is justified by a long record of abuses of power. It is often said that history shows (itself a formula) that even a minimal restriction on the right of expression too easily leads to ever-larger restrictions; and to the extent that this is an empirical fact (and it is a question one could debate), there is some comfort and protection to be found in a procedure that re-quires you to jump through hoops—do a lot of argumentative work—before a speech regulation will be allowed to stand.

#### There is no such thing as free speech – depending it can ever be neutral and apolitical leaves us lost in abstractions that prevent recognition of the true function of speech

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It is a counsel that follows from the thesis that there is no such thing as free speech, which is not, after all, a thesis as startling or corrosive as may first have seemed. It merely says that there is no class of utterances separable from the world of conduct and that therefore the identification of some utterances as members of that nonexistent class will always be evidence that a political line has been drawn rather than a line that denies politics entry into the forum of public discourse. It is the job of the First Amendment to mark out an area in which competing views can be considered without state interference; but if the very marking out of that area is itself an interference (as it always will be), First Amendment jurisprudence is inevitably self-defeating and subversive of its own aspirations. That's the bad news. The good news is that precisely because speech is never "free" in the two senses required—free of consequences and free from state pressure—speech always matters, is always doing work; because everything we say impinges on the world in ways indistinguishable from the effects of physical action, we must take responsibility for our verbal performances—all of them—and not assume that they are being taken cares of by a clause in the Constitution. Of course, with responsibility comes risks, but they have always been our risks, and no doctrine of free speech has ever insulated us from them. They are the risks, respectively, of permitting speech that does obvious harm and of shutting off speech in ways that might deny us the benefit of Joyce's Ulysses or Lawrence's Lady Chatterly's Lover or Titian's paintings. Nothing, I repeat, can insulate us from those risks. (If there is no normative guidance in determining when and what speech to protect, there is no normative guidance in determining what is art—like free speech a category that includes everything and nothing—and what is obscenity.)Moreover, nothing can provide us with a principle for deciding which risk in the long run is the best to take. I am persuaded that at the present moment, right now, the risk of not attending to hate speech is greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope toward tyranny. This is a judgment for which I can offer reasons but no guarantees. All I am saying is that the judgments of those who would come down on the other side carry no guarantees either. They urge us to put our faith in apolitical abstractions, but the abstractions they invoke—the marketplace of ideas, speech alone, speech itself—only come in political guises, and therefore in trusting to them we fall (unwittingly) under the sway of the very forces we wish to keep at bay. It is not that there are no choices to make or means of making them; it is just that the choices as well as the means are inextricable from the din and confusion of partisan struggle. There is no safe place.

#### Speech will always be political; ideological constraints are necessary to its intelligibility

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When a shorter version of this essay was first published, it drew a number of indignant letters from readers who took me to be making a recommendation: let's abandon principles, or let's dispense with an open mind. But, in fact, I am not making a recommendation but declaring what I take to bean unavoidable truth. That truth is not that freedom of speech should be abridged but that freedom of speech is a conceptual impossibility because the condition of speech's being free in the first place is unrealizable. That condition corresponds to the hope, represented by the often-invoked "marketplace of ideas," that we can fashion a forum in which ideas can be considered independently of political and ideological constraint. My point, not engaged by the letters, is that constraint of an ideological kind is generative of speech and that therefore the very intelligibility of speech (as assertion rather than noise) is radically dependent on what free-speech ideo-logues would push away. Absent some already-in-place and (for the time being) unquestioned ideological vision, the act of speaking would make no sense, because it would not be resonating against any background under-standing of the possible courses of physical or verbal actions and their pos-sible consequences. Nor is that background accessible to the speaker it con-strains; it is not an object of his or her critical self-consciousness; rather, it constitutes the field in which consciousness occurs, and therefore the productions of consciousness, and specifically speech, will always be political(that is, angled) in ways the speaker cannot know.

#### Openness is emptiness

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In general, the letter writers ignore my challenge to the binaries on which their arguments depend, and take to chiding me for failing to respect distinctions whose lack of cogency has been a large part of my point. Thus, Professor Haiman solemnly informs me that an open mind is not the same as an empty one; but, in my analysis—which Professor Haiman is of course not obliged to accept but is surely obliged to note—they are the same. An open mind is presumably a mind not unduly committed to its present con-tents, but a mind so structured, or, rather, unstructured, would lack a framework or in-place background in relation to which the world (both of action and speech) would be intelligible. A mind so open that it was anchored by no assumptions, no convictions of the kind that order and stabilize perception, would be a mind without gestalt and therefore without the capacity of keeping anything in. A consciousness not shored up at one end by a belief (not always the same one) whose negation it could not think would be a sieve. In short, it would be empty.

#### The idea of counterspeech solves is non-sensical – introduction of an idea into the cultural air changes the machinery of deliberation and gives these views legitimacy

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Professor Strout ventures into the same (incoherent) territory when he takes me to task for "confusing toleration with endorsing" and "justify-ing" with "putting up with." The idea is that a policy of allowing hate speech does not constitute approval of hate speech but shifts the responsibility for approving or disapproving to the free choice of free individuals. But this is to assume that the machinery of deliberation in individuals is purely formal and is unaffected by what is or is not in the cultural air. Such an assumption is absolutely necessary to the liberal epistemology shared by my respondents, but it is one that I reject because, as I have argued else-where, the context of deliberation is cultural (rather than formal or genetic),and because it is cultural, the outcome of deliberation cannot help being influenced by whatever notions are current in the culture. (Minds are not free, as the liberal epistemology implies, for the same reason that they cannot be open.) The fact that David Duke was rudely and provocatively questioned by reporters on "Sixty Minutes" or "Meet the Press" was less important than the fact that he was on "Sixty Minutes" and "Meet the Press" in the first place, for these appearances legitimized him and put his views into national circulation in a way that made them an unavoidable component of the nation's thinking. Tolerating may be different from endorsing from the point of view of the tolerator, who can then disclaim responsibility for the effects of what he has not endorsed, but, if the effects are real and consequential, as I argue they are, the difference may be cold comfort.

#### The aff forces us to sacrifice our values and identities for the sake of an abstraction

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This sounds fine (even patriotic), but it runs afoul of problems at both ends. The "entry" problem is the one I have already identified in my reply to Professor Post: the marketplace of ideas—the protected forum of public discourse—will be structured by the same political considerations it was designed to hold at bay; and therefore, the workings of the marketplace will not be free in the sense required, that is, be uninflected by governmental action (the government is given the task of managing the marketplace and therefore the opportunity to determine its contours). Things are even worse at the other end, the exit or no-exit end. If our commitment to freedom of speech is so strong that it obliges us, as Holmes declares, to tolerate "opinions . . . we . . . believe to be fraught with death" (a characterization that recognizes the awful consequentiality of speech and implicitly under-cuts any speech/action distinction), then we are being asked to court our own destruction for the sake of an abstraction that may doom us rather than save us. There are really only three alternatives: either Holmes does not mean it, as is suggested by his instant qualification ("unless . . . an immediate check is required to save the country"), or he means it but doesn't think that opinions fraught with death could ever triumph in a free market(in which case he commits himself to a progressivism he neither analyzes nor declares), or he means it and thinks deadly opinions could, in fact, triumph, but is saying something like ' 'que sera, sera,'' (as it would appear he is in a later dissent, Gitlow v. New York). Each of these readings of what Holmes is telling us in Abrams and Gitlow is problematic, and it is the problems in the position born out of these two dissents that have been explored in my essay. The replies to that essay, as far as I can see, do not address those problems but continue simply to rehearse the pieties my analysis troubles. Keep those cards and letters coming.

#### Double bind – either the constitution has meaning because it promotes certain values, which means that speech can be regulated to achieve those, or the first amendment has no meaning which means that there’s no reason to follow it

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Now some would say that there needn't be a reason given for the First Amendment’s flat prohibition of the abridging of speech. My colleague William Van Alstyne, for example, declares roundly that "the First Amendment does not link the protection it provides with any particular objective and may . . . be deemed to operate without regard to anyone's view of how well the speech it protects may or may not serve such an objective." But it is one thing to say that the First Amendment, as written, does not include a rationale for its existence, and another to say that therefore there is not, nor need be, and such rationale. There is always the category of "it goes without saying," as in "it goes without saying that underlying the laws against theft is a theory of property and property rights, even if the law does not itself come accompanied with an account of the theory that underlies it." Most discussion of the doctrine of free speech, including the discussions by John Milton and J.S. Mill, begin by specifying the values or goals that a free-speech regime will presumably protect or encourage; and traditionally those values and goals have been thought to be(1) the emergence of truth as the product of public discussion, (2) the self-fulfillment of individuals who are best served if they have access to as many views and arguments as possible, and (3) the maintenance and furtherance of democratic process, of the serious business of self-government by an informed population. Once this list, or some other similarly drawn, is in place, it becomes possible and indeed obligatory to ask of any instance of speech that has been the cause of distress or harm to some citizens: "Does this speech contribute to the healthy flourishing of the relevant values, or is it positively dangerous to their continued existence?" If you don't ask this question, or some version of it, but just say that speech is speech and that's it, you are mystifying—presenting as an arbitrary and untheorized flat—a policy that will seem whimsical or worse to those whose interests it harms or dismisses. Free-speech purists will respond that once you start regulating speech because it has been deemed unrelated to the protection of a set of core values, you never know where the process will stop; you never know what will be regulated next. To this I would respond, but if you don't provide a rationale for the toleration of a particular form of speech, but simply declare that the Constitution made me do it, you will have characterized the Constitution as an irrational document. The choice is clear; either acknowledge that, like other items in the Constitution, the First Amendment has a purpose and that in the light of that purpose some acts of toleration make sense and some don't; or acknowledge that the free-speech clause has no purpose beyond itself, and face the conclusion that there is no compel-ling—that is, serious—reason for adhering to it. It may sound paradoxical, but the First Amendment has a positive claim on us only if we understand it to be self-qualifying: you will not abridge speech that is supportive of the values in the name of which we have joined together. Regulation of other forms of speech—speech either irrelevant to the maintenance of those values or subversive of them—should not be regarded as an exception to the amendment but as a fulfillment of its mandate.

**The first amendment reaffirms the notion that speech can not constitute a harm since it’s constrained 2 ur mind but that’s bad and abstraction**

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This is where the idea that there is no such thing as a false idea (and therefore no such thing as a true idea, like the idea that women are full-fledged human beings or the idea that Jews shouldn't be killed) gets you; it prevents you, as a matter of principle, from inquiring into the real-world consequences of allowing certain forms of so-called speech to flourish. Be-hind the principle (that there is no such thing as a false idea) lies a vision of human life as something lived largely in the head. There is an entire book to be written about the stigmatization and devaluation of the body in First Amendment jurisprudence, but for the moment I will point out that First Amendment jurisprudence works only if you assume that mental activities, even when they emerge into speech, remain safely quarantined in the cortex and do not spill over into the real world, where they can inflict harm.

#### Function of colleges proves that free speech can be limited for them to fulfill their purpose

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This way of reasoning, in which different kinds of institutions will have different responsibilities in relation to the same speech, will be anathema to those who hold that it is the very essence of a college or university to foster free expression and the uninhibited circulation of ideas, however offensive they might be to some members of the community. This makes sense if we think of colleges and universities primarily as "open forums" whose purpose is to encourage unregulated investigation of any matter un-der the sun. But there is another way to think about the campus scene, not as a free-speech forum but as a workplace where people have contractual obligations, assigned duties, pedagogical and administrative responsibilities, and so on, and if we accept that analogy rather than the analogy of a protected zone of unimpaired expression, the stigmatization of intimidating or assaultive speech will be a straightforward extension of existing law un-der Title VII of the 1964 Civil Rights Act. It was under Title VII that a court in Florida recently held the operators of a shipyard culpable for per-mitting so-called girlie calendars to remain on the walls of the shop even after receiving the detailed complaints of many women employees (Robin-son v. Jacksonville Shipyards, Inc., U.S. District Court, Middle District of Florida, Jacksonville Division, No. 86-927-J-12 January 18, 1991). Predictably, the shipyard managers raised a "free-speech" defense, but the court rejected it. The workplace, the court stated, is for working, and therefore an "employer may lawfully withhold its consent for employees to engage in expressive activities" if those activities produce "special harms" in the form of a work atmosphere destructive of the abilities of some employees to perform their duties with a sense of dignity and safety. If the campus is a workplace, as it surely is by any definition of workplace that could be imagined, then it would seem appropriate and even obligatory for an administration to take judicial note of activities—including verbal activ-ities—that make the workplace intolerable for some members of the com-munity. As the Florida court points out, this does not mean that the protection afforded disagreeable speech "in the world at large" is being withdrawn ;a workplace is not the world at large (I would wonder whether anything is);and even if "the speech at issue" is elsewhere "fully protected," the court "must balance" against this presumed protection "the governmental interest in cleaning the workplace of impediments to the equality of women," and I would add, to the equality of African Americans or gays or Jews or any other group entitled to move freely and without undue anxiety within the precincts of a public, commercial, or educational institution.

#### Ignore their INTELLECTUAL GYMNASTICS with their ABSTRACT ARGUMENTS that don’t encounter the REAL WORLD. Slippery slope – no!

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To this some will object that it's fine to talk about caution and reluctance, but once you begin to regulate and discipline, there is no natural place to stop; and what begins as a small and limited restriction may in time flower into full-fledged tyranny. This is known in the trade as the "slippery slope" argument, and it says that, given the danger of going down the regulatory road, it is safer never to begin. But the slippery slope argument is another one of those exercises in abstract reasoning that imagines a worse-case scenario every time because nothing fills up its landscape but its own assumptions. That is, the slippery slope argument assumes that there is nothing in place, no underbrush, to stop the slide; but in any complexly organized society there will always be counter values to invoke and invested persons to invoke them. Slippery slope trajectories are inevitable only in the head, where you can slide from A to B to Z with nothing to retard the acceleration of the logic. In the real world, however, the step even from A to B will always meet with resistance of all kinds from persons differently positioned, and, as a matter of fact, the chances of ever getting to Z are next to nothing. Somewhere along the route some asserted interest will stop the slide, and a line will be drawn beyond which regulators will be pre-vented from going, at least for a time, until new pressures and new resistances provoke a new round of debates, at the end of which still another line will be provisionally drawn.

#### Deciding to not draw lines about what constitutes good/bad speech is impossible

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Wouldn't it be better, then, to refrain from drawing any lines at all? It might be better if it were possible, but you can only refrain if you know exactly where the line should not be drawn; and you cannot know that without already having drawn the line beyond which you will refuse to draw any others; and you can only do that with the help of definitions and distinctions that will involve you in drawing just the kind of line you have pledged to avoid. If you resolve, for example, to draw the line at speech, you first must define speech; but since any definition of what speech is will be controversial—will seem to some to be too narrowly exclusive, ruling out symbolic expression, and will seem to others to be overly inclusive, running the risk that everything will be labeled speech—the line you then draw with the intention of not going beyond it to draw any other lines will already be in violation of that intention.

### **Lawrence**

#### Brown v. Board of Education establishes precedent for limiting racist hate speech

Lawrence 90. Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke Law Journal 431-483 (1990) <http://scholarship.law.duke.edu/dlj/vol39/iss3/2>. NP 1/20/17.

The landmark case of Brown v. Board of Education is not a case we normally think of as a case about speech. As read most narrowly, the case is about the rights of black children to equal educational opportunity. But Brown can also be read more broadly to articulate a principle central to any substantive understanding of the equal protection clause, the foundation on which all anti-discrimination law rests. This is the principle of equal citizenship. Under that principle "every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."' 36 Furthermore, it requires the affirmative disestablishment of societal practices that treat people as members of an inferior or dependent caste, as unworthy to participate in the larger community. The holding in Brown-that racially segregated schools violate the equal protection clause-reflects the fact that segregation amounts to a demeaning, caste-creating practice. 37 The key to this understanding of Brown is that the practice of segregation, the practice the Court held inherently unconstitutional, was speech. Brown held that segregation is unconstitutional not simply because the physical separation of black and white children is bad38 or because resources were distributed unequally among black and white schools. 39 Brown held that segregated schools were unconstitutional primarily because of the message segregation conveys-the message that black children are an untouchable caste, unfit to be educated with white children. 4° Segregation serves its purpose by conveying an idea. It stamps a badge of inferiority upon blacks, and this badge communicates a message to others in the community, as well as to blacks wearing the badge, that is injurious to blacks. Therefore, Brown may be read as regulating the content of racist speech. As a regulation of racist speech, the decision is an exception to the usual rule that regulation of speech content is presumed unconstitutional. 41

#### Brown v. Board of Education establishes that communicating the message of white supremacy is wrong, with logically implicates speech

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If, for example, John W. Davis, counsel for the Board of Education of Topeka, Kansas, had been asked during oral argument in Brown to state the Board's purpose in educating black and white children in separate schools, he would have been hard pressed to answer in a way unrelated to the purpose of designating black children as inferior.44 If segregation's primary goal is to convey the message of white supremacy, then Brown's declaration that segregation is unconstitutional amounts to a regulation of the message of white supremacy. 45 Properly understood, Brown and its progeny require that the systematic group defamation of segregation be disestablished. 46 Although the exclusion of black children from white schools and the denial of educational resources and association that accompany exclusion can be characterized as conduct, these particular instances of conduct are concerned primarily with communicating the idea of white supremacy. The **non**-speech elements are byproducts of the main message rather than the message simply a by-product of unlawful conduct. 47

#### Brown v Board of Ed prohibits things based on the message communicated – also applies to speech

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### **Gey**

Gey 96, Steven G. The Case against Postmodern Censorship Theory. University of Pennsylvania Law Review, Vol. 145, No. 2 (Dec., 1996), pp. 193-297

### Moles

#### Mental contamination undermines autonomy and prevents agents from acting in accordance with their belief system

Moles 6, Andrés. (Andres Moles read Philosophy at the National University of Mexico (UNAM) finishing in 2001, and received an MA in Philosophy and Social Theory (2003) and a PhD in Politics (2007) both at the University of Warwick.) Autonomy, Free Speech and Automatic Behaviour. Springer 2006

Mental contamination is ‘the process whereby a person has an unwanted response because of mental processing that is un- conscious or incontrollableÕ.63 An important feature of this defini- tion of mental contamination is that it is subjectively defined. This means that contamination occurs when an agent responds in a way [s]she would not like to respond.64 This condition belongs conceptually to the same category as the identification condition discussed in the first section. It is obvious that mental contamination as defined is a violation of autonomy. One cannot respond in unwanted ways, while at the same time satisfying the conditions of ‘identificationÕ and ‘rightÕ belief formation (conditions 1 and 2 in the first part). As such, mental contamination is related to external stimuli that impinge on peopleÕs minds usually without their own awareness – and, necessarily, without their own approval. Notice that not every automatic response threatens autonomy. If we did not have automatic responses we would be completely incapable of living a human life.65 In this sense, there is nothing wrong with unconscious processes and automatic responses as such. The problem emerges when we face un- wanted automatic responses. Mental contamination threatens autonomy in different ways. First, it presents an obvious challenge to the condition of identification in so far as agents whose responses are contaminated cannot identify with them. The teacher who wants to be fair but who nevertheless unconsciously gives a higher mark to a student because he likes him, because of the halo effect, cannot identify himself with his automatic response. The very definition of what counts as mental contamination rules out the identification condition. Second, the process by which mental contamination takes place also conflicts with the ‘rightÕ causal history of desires and beliefs. Contaminated responses are not the outcome of reasons but of external influences that have not been considered. We need to look at the mechanisms that cause the unwanted responses and also at the environmental features that trigger those mechanisms. For instance, in the case of the aggressive reactions towards black peo- ple, we must look at the psychological mechanisms that produce the response; and we must also look at the social environment that triggers the response – in this case, a society which has created a ste- reotype according to which black people are aggressive, sexually dan- gerous, prone to criminality, lazy, etc.66 Third, mental contamination poses an important threat to our critical judgement, to the extent that it makes us react in ways we would not want to. When an agent reacts in a contaminated way his response is ‘alienÕ to him, in that he cannot approve the way in which he is acting. His action is not caused by his values and beliefs but by the mental processes he rejects. In order to neutralise mental contamination, four steps are needed. Imagine that someone is marking two studentsÕ essays. One of them is written by a physically attractive student, while the other is written by an unattractive one. The marker gives the first student a 65, while she gives the second student a 63. The teacher believes that the marks are fair and reflect only the quality of the written work, and that they are completely independent from the attractive- ness of the student (let suppose that in an unbiased evaluation both essays get a 64). Recall the ‘halo effectÕ discussed above – objective evaluations such as marking essays are contaminated by subjective evaluations such as liking or disliking people. In order to neutralise the bias, the first step the teacher needs to take is to be aware that the bias is likely to influence her judgement. But this is not enough; as a second step, the person needs also to be motivated to neutralise the bias. The teacher must concede that she is actually susceptible to being biased towards her attractive student and needs to be moti- vated to act in such a way that the bias is eliminated. This step is hard to take because it violates our common sense theory about ourselves. When she reads about the halo effect she would probably say – ‘hold on, I believe that this ‘halo effectÕ might occur to some people, but surely not to me. IÕm being fair!Õ. So, if the person is not motivated to neutralise the bias, contamina- tion will take place. A third element necessary for avoiding con- tamination is awareness of the direction and magnitude of the bias. Imagine that this teacher reckons that she might be influenced by the halo effect, but she does not know how much she is being biased. Surely, she could take 5 points away from the attractive student, or give 5 extra points to the unattractive one. But then her marking will be biased again, this time not because of the halo ef- fect, but because she has overcompensated for the initial bias. So the fourth element needed is the ability to adjust the response in non-contaminated way. People do employ various strategies to avoid contamination, but most of them seem to be unsuccessful, especially because they usually overestimate their own abilities to control their mental processes. Failure to satisfy any one of the conditions above will end up in contamination. The difficulty in controlling bias comes from our very limited introspective capabilities, from the commonly held idea that we are transparent to ourselves and from a tendency to overestimate our capacity to eliminate contamination: people think, ‘maybe others, but not meÕ.

Regarding autonomy, it seems that a necessary condition for achieving it is to neutralise as far as possible the unwanted responses that are caused by the environment. It is indeed important to protect autonomy, but we need to be sensitive to the reality of phenomena such as automatic behaviour, and we need to get a better understanding of the threats it faces. Neutralising all sources of mental contamination is very hard. Nonetheless we need to cate- gorise the risks that different forms of contamination pose to autonomy: to have contaminated reactions regarding trivia such as flavours of lollipops is very different from have such reactions about ethnicity. Automatic responses according to racial stereotypes are not a threat to everyone’s autonomy. There are people who might identify themselves with such reactions, people who accept the content of stereotypes and who autonomously choose to perpetuate them. For them, automatic behaviour of this kind is consistent with their autonomy. This does not mean, of course, that explicit racists are not susceptible to other forms of mental contamination. For instance, someone can be a racist, and regret his reactions regard- ing gender stereotypes. However, for many of us, reacting aggres- sively towards black people and implicitly associating them with negative traits is something to regret, and possibly even to abhor. It is because of these phenomena that the protection of autonomy requires to us rethink some of the associations we usually make between autonomy and the protection of free speech.

#### Counterspeech can’t solve since exposure to beliefs in the first place makes them ingrained and difficult to challenge with reason – this outweighs. Minimizing initial exposure to problematic ideas is the best solution.

Moles 6, Andrés. (Andres Moles read Philosophy at the National University of Mexico (UNAM) finishing in 2001, and received an MA in Philosophy and Social Theory (2003) and a PhD in Politics (2007) both at the University of Warwick.) Autonomy, Free Speech and Automatic Behaviour. Springer 2006

Audience-based autonomy defences of free speech argue that audience interests are better served by protecting freedom of expression.67 These defences claim that free speech serves auton- omy and critical reflection by offering a wide range of viewpoints whose relative merits audiences can assess. Free speech also offers audiences valuable information and evidence that helps them to decide different aspects of their conception of the good. It is also claimed – notably by J.S. Mill – that free speech forces people to criti- cally assess and defend the grounds of their own views when presented with alternatives. However, free speech also has its costs. It is highly contaminating: consider violent pornography and entertainment, the creation, transmission and enforcement of racial and gender stereotypes, and so on.68 Defences of free speech sometimes try to minimise these costs by advocating ‘more, better speechÕ.69 The idea is that through rational debate and discussion, audiences will autonomously come to realise that the content of stereotypes is false and based on prejudice. Free speech, then, would then have two benefits: it would fight racism and foster rational autonomy. This strategy is not without its problems. Many people who believe they are not racists still manifest racist reactions.70 It is dif- ficult to convince them that, regardless of what they think of them- selves, they sometimes react as racists. Moreover, it has been shown that sometimes trying not to respond according to the stereotype has the ‘ironic effect of increasing the frequency of stereotypical reactions.71 Similarly, it has been argued that we have a tendency to believe propositions we understand, even when we are explicitly told that they are false. Daniel Gilbert argues that due to the way our system of forming beliefs works, we have a tendency automatically to accept propositions we understand. Rejection requires effort. This second step can be inhibited when individualsÕ mental resources are depleted, for instance by devoting attention to other things, or by lack of sleep, or under torture, or time constraints. If the rejection process is interfered with, then individuals may accept propositions which they would otherwise reject.72 More, better speech seems not be able to cope with this prob- lem, mainly because it aims at rational, conscious processes of belief formation, while the challenges I am presenting here occur at automatic, non-conscious levels. Wilson and Brekke suggest that another strategy might be more successful: exposure control. Just as in the case of normal pollution, the best way of protecting oneself is avoiding being exposed to the polluting agent; the most effective strategy to fight mental contamination could be to avoid the sources of bias. This strategy is already used in certain domains. Teachers assess anonymous essays and exams, journals impose blind controls when considering submissions, and so on. Exposure control is not free of problems; first, the main issue about who is to control what people are exposed to remains open. Second, because we cannot neutralise every source of contamination, we need to categorise the weights of different forms of contamination (racial and gender based are particularly important). Regardless of these problems, it seems that controlling exposure to the serious sources of biasing is a necessary condition for autonomy. This in turn requires that social relations are sensitive to contamination and that the exposure to sources of contamina- tion is more or less socially controlled.

### Carnera//deleuze answers

#### Freedom of speech is not an end, rather, it is constructed in opposition to a condemned other, and acts as a superficial representation of ideas rather than an idea itself

Carnera 12, Alexander. Freedom of Speech as an Expressive Mode of Existence. Int J Semiot Law (2012) 25:57–69. 20 November 2010. NP 1/18/17.

I am going to address the relation between freedom of speech with our capacity and power to speak as such. Let me first briefly show how this paper differs from the approach focusing on the enlightenment tradition, also nurtured in the literature of Jurisprudence. Historically, there has been a close relation between freedom of speech on the one hand with political power and with the function of the state on the other. The appearance in public space of religion, terrorism, and other kinds of threats against democracy has in recent years received much attention and discussion within jurisprudential research and political philosophy. This stream of research has incorporated Spinoza as a critique of religious authority [16].2 The difference between Spinoza and the tradition of enlightenment, exemplified by Locke and Le Clerc, is that Spinoza refuses to make paramount the protection of religious faith; there is for him an obligation to fight against the institutional and dogmatic church, and its increasing influence on legislation and the political domain. As understood by Jonathan Israel, Spinoza’s philosophy is more than enlightenment: it is ‘a radical enlightenment’ [15]. He not only advocates in favor of thought and the free mind, but he also emphasizes the importance of critique and resistance against any external power that diminishes or suppresses the power of thought. This turns enlightenment into a liberating weapon for being human; the development of the power of thought is the necessary cause of freedom. Israel is right to emphasize this dimension in Spinoza’s thinking. My argument is to show that we should turn to his Ethics to understand the very mode and existence of freedom of speech. Spinoza’s philosophy offers a unique account of the power of thought and free thinking that has to be analyzed from its immanent praxis. The power of a new, radical enlightenment relies first of all not on an external critical position, but in capturing the creative efficient cause of producing free ideas: the transformation of sad affects into active affects.3 Where enlightenment is reduced to a critical position, there negation becomes the driving force: reason negates religion, and enlightened thought negates totalitarian authorities. Negation is one of the basic features associated with the concept of criticism; however, negation is an insufficient cause [8, p. 89]. A Spinozian notion of freedom of speech, with its critical potential, cannot be analyzed from a given position. We must approach the subject from the internal mode of producing ideas: what Spinoza called ‘adequate ideas’. As we shall see, this connects Spinoza’s theory of actual existence (our power to act) with the act of producing our freedom in thought (producing adequate ideas). Hence, we should be able to investigate freedom of speech from the perspective of power, resistance, and creativity. Rather than placing freedom in opposition to suppression, we ask how does this freedom come into existence in the first place, and how can we determine its power of existence. Taking this approach, it will be possible to displace the focus for the matter of critical thought as being an autonomous ‘project of enlightenment’ into a question of the efficient causes of the freedom of speech. It is not enough to refer to an inviolable principle like freedom of speech when we wish to speak out about whatever we want. This appeal by the enlightened man is the accustomed strategy in both jurisprudence and legal thinking. The legal philosopher Ronald Dworkin uses a strategy that affirms our own primary freedom of speech by referring to an opposition (such as the Taliban) that is not in possession of an enlightened tradition. Dworkin encourages us to fight back against ‘‘the new enemies who claim to speak about freedom and not tyranny’’ [11]. This strategy shows us that freedom of speech is not adequately substantial to maintain its own force and authority because it has to seek affirmation of its own primary freedom by referring to a posited imaginary opposition. Through this double strategy, the inferior other is revealed while demonstrating one’s own tolerance. What is properly affirmed is that one already has a position from which to judge: a position of being enlightened, and a position lacking possession of this higher wisdom. This strategy for freedom of speech only negates,and, as we shall see, leads to nihilism. In 2004 at the annual labor Congress in UK, a demonstrator loudly declared his disappointment of the British Government over the invasion in Iraq. He was immediately overpowered by two guards and removed from the convention. The prime minister shouted after him: ‘‘There you see, you can declare your protest. Thank God we live in a democracy’’ [3]. This hidden ‘reactive logic’ of reasoning rests on a formal notion of freedom of speech in which any utterance by the use of words, images, and signs only refers to a superficial ‘representation’ of the content of the idea, and not the causal power of the idea itself. What makes Spinoza’s philosophy particularly useful in resetting the frame of freedom of speech into this expressive mode is the fact that his whole materialistic philosophy can be expressed in one phrase made by the famous Spinoza-scholar Althusser: ‘‘The truth of philosophy exists in its effects’’ [22]. Neither consciousness nor the will can rise to the status of being the first principle in explaining the formation of society, or the freedom of speech. The power of explanation lies somewhere else. The power of this explanation will provide us with the answer of the logic of sense as an expressive sense.

#### Deleuze is consequentialist; actions are embodied, meaning that intentions can’t be separated from their effects

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Spinoza: Ethics. Part 1. Def. 6:’’By God I understand a being absolutely infinite, that is, a substance consisting of an infinity of attributes, of which each one expresses an eternal and infinite essence. Spinoza: Ethics. Pinguin Books. 1996. p. 1. According to Spinoza Gud is one, indivisible, and he consists of infinite attributes, hence we are confronted with a kind of thinking in which there is no hierarchy. When everything is in God, everything that exists has the same ontological status. The point is that no substance is prior to its attributes. It has neither logical nor chronological priority. Rather, substance is the same as its attributes. The essence of things would cease to exist without the qualities and properties that belong to its nature. This reading of Spinoza became part of Deleuze’s breakthrough in which he lays the foundation for the so-called ‘new Spinoza.’ (See Montag & Stoltz anthology: The New Spinoza 1999). Deleuze puts great emphasis on the fact that all attributes have equal value. There are no ranking of qualities. The attribute ‘thinking’, for example, can therefore not be more important than another attribute such as the attribute ‘extension’. In the universe of Spinoza the mode of thought can neither be superior nor subordinate its mode of extension. This is what leads Deleuze to his theory of expressionism: When the attribute or the substance expresses what is created, it cannot be separated from that which is created; rather it is included within it. In other words, there is no other force behind the expression. God is nothing beyond his effects.

#### We must take into account the causal effects of freedom of speech

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In the last 30 years we have seen a turn in the reception of Spinoza’s thought on materialism as a denial of the priority of mind over the body [5]; [19]; [18]; [21]; [24]. In that reading of Spinoza, the earlier idealist interpretation associated with the attributes was founded by Martial Gueroult, and later followed up by an entire generation of French and Italian thinkers (noted above).4 In the following I will rely primarily on Hardt’s reading of Deleuze, and Deleuze’s reading of Spinoza. This will be followed by my own reading of Spinoza. In his ground-breaking work on Deleuze, Michael Hardt sums up the important critique of any idealism: ‘‘The attributes cannot be dependent on the intellect because the intellect is a mode of thought, and therefore ontologically prior to the attributes’’ [13, p. 75]. Whereas the first foundation of the Ethics turned out to be a dualism between God on the one hand, and the World on the other, the foundation later taken up by Spinoza has constituting nature taking priority over constituted nature. In Spinoza’s approach to knowledge the mode or the event of thinking takes priority, whereas the attributes are included within expressive mode itself. In the already noted works of Negri and Deleuze, this approach brings to attention a new kind of materialism of critical, social, and legal thinking. As Michael Hardt concludes: ‘‘What is at stake [...], are the very terms of a materialist ontology, an ontology that does not found being in thought’’ [13, p. 75]. Hence, attributes are merely a way of knowing. In contrast with Descartes, that which explains a material world is the affections of the body, that which allows a body to be affected, and in turn be affective itself. ‘‘Whatever diminishes the power of the body diminishes the power of the mind’’ [29, III, p. 12–13]. In other words, the problematic of freedom of speech should take into account the causal effects. We should read Spinoza as being the first modern thinker who takes the body as the model for knowledge. Spinoza brings the body back not as a first cause, but as a living dynamic for the creation of knowledge. Hardt argues that the mind’s power to think and its developments are parallel to the body’s power to act. This is not the same as saying that the mind can determine the body to act, or that the body can determine the mind to think. On the contrary, Spinoza maintains that mind and body are autonomous, but that they nonetheless proceed or develop in parallel fashion. Such a claim does not in any way resolve the question of the relation of body and mind; rather, it poses this relation as a problem for research. Each time we consider the mind’s power to think, we must try to recognize how it corresponds to the body’s power to act. The notion of correspondence here is essentially open and indefinite. The affect of the body straddles this relationship. We could say that there are two levels in any human event, including the event of speaking (the utterance): the bodily state of intensity, and a state of suspension; a potential disruption, and simultaneously semantics, language, narration, and expectations. The perspective of body and affect does not assume that reason and passion are the same, but treat them in a graduated continuum. As Spinoza says: ‘‘The order and connection of ideas is the same as the order and connection of things’’ [29, III, p. 7]. The point is that the different attributes are not only equal expressions of being, they are as Deleuze and Hardt emphasize, ‘‘the same expression’’ [13, p. 81]. The mode of existence of the various attributes are the same from the point of view of substance: the power of affects. Hence, sad affects diminish our power to act and to think, whereas active affects increase our power to act and think. They are just a different point of view from the same substance; hence, the principle of univocity. The challenge is to see how affects (the composition of substance), despite language and its reduction, are able to expand and change our actions, expectations, and decisions that thereby change our power to act and to produce ideas. From this, the logic of sense is connected to an ontological expressionism: an idea being expressive is a variation of substance as a particular mode of thinking. Expressionism captures the virtual dimension of the body. According to Deleuze every actual body expresses a set of traits, habits, movements, affects, but the actual body also has a virtual dimension: a vast reservoir of potential affects, relations, and movements. Therefore, ontological expressionism directs our attention towards the possible elements in each singular situation. The virtual plane of expression will be an important tool facilitating a critical approach to freedom of speech.

#### Speech must be a mode that allows us to actualize and produce thoughts that embrace affect

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A true idea is an idea that corresponds with its object (res ideata), and poses only a formal correspondence. It is blind to the internal causality of the production process. Deleuze notes: ‘‘The conception of truth as correspondence gives us no definition, either formal or material, of truth; it proposes a purely nominal definition, an extrinsic definition’’ [5, p. 131]. Deleuze argues that Descartes’ proposition of ‘‘clear and distinct’’ ideas cannot capture a real content because the formal dimension of the clear and distinct elements of an idea cannot comprehend the efficient cause of the idea. In other words, Spinoza’s concept of an adequate idea as incorporating the efficient cause not only refers to the idea, but explains the process of their production. Deleuze relates this ontological dimension of Spinoza’s approach to the notion of expression. For an idea to be expressive it must also envelop and explain its own cause, its own production, and, therefore, it’s very mode of existence. ‘‘A clear and distinct idea is still inexpressive, and remains unexplained. Good enough for recognition, but unable to provide a real principle of knowledge’’ [5, p. 152–153]. To include the causal dimension is to take into account the fundamental question relating to truth in speech: Who is speaking, who wants freedom, in what situation, why, and what is at stake? A Spinozian definition of freedom of speech must involve the expression of its causality, production, and power. This prepares us in our argument to shift from a true idea to an adequate idea the essential feature of which capture the internal relation of an idea to its cause: ‘‘The adequate idea is precisely the idea as expressing its cause’’ [5, p. 133]. The truth of speech has to be located as the singular production that envelops and expresses its own cause. The more an adequate idea expresses the affective connection to other bodes and to its causal dimension, the more we can increase our power of thought and power to act. Hence, what Spinoza calls ‘ideas’ embraces certain inexplicit modes of existence and types of affects. The problem of gaining knowledge is tied to our modes of experience and our modes of experimenting. Therefore, the problem of knowledge is attached to the effect of what our body can do, our receptivity, and our capacity to affect other bodies. Ideas in this respect are based on our situated exchange with other bodies. Spinoza writes: ‘‘The mind does not know itself, except insofar as it perceives the ideas of the affections of the body’’ [29, II, P. 23, 49]. Later he says: ‘‘For indeed, no one has yet determined what the body can do...’’ [29, III, P. 2. Schol. 71]. We can never have an exhausted conception of the functions of the body, and therefore of the mind’s final organizing of the condition of the body. Deleuze’s reading of Spinoza emphasizes this point. In his first book on Spinoza Deleuze wrote the now famous line: ‘‘The attributes turn about in their modes’’ [5, p. 105]. I now claim that Deleuze in locating the problem of knowledge at the level of modes created a pragmatic method for social relations based on bodily encounters. His first point was that there is no substance before the active mode of thought; our forms of knowledge are modes of existence. His second point is that the what is of the substance is what it expresses. God’s essence is his power to evolve, as Spinoza would say. Rather than placing the subject as the sovereign axis, knowledge is attached to our potentia to produce ideas [imaginatio potentia] [29, II. p. 14–22, 44–49]. The content of the substance of things happens within our expressive mode of affirming our actual mode of being. This productive power of our being involves an affirmation of the idea in the conscious mind (the spiritual automaton), and this affirmation is connected to the state of our body, our mode of existence. Our mode of producing embraces the capacity to be affected. Hence, the production of knowledge is an ethics of organizing bodily encounters that select and actualize possible potentials.

#### Knowledge and expression must be connected to our power to act and be affected by encounters with others

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I now claim that we can read this ethics of organizing encounters as a practical method for understanding the interactive processes regarding the problems of freedom of speech. Our mind can organize different encounters between bodies because of the endless possibility of combinations of the body: combinations we cannot judge in advance. To produce ideas is to create ourselves through bodily exchange. This connects the problem of freedom of speech to the art of ethics: The problem of knowledge is an individuated practice, and the production of knowledge is connected to our power to act. Hence, the true problem of freedom of speech rests on our power to act. In Spinoza’s philosophy, this power is attached to a process converting passive affects into active affects. When Spinoza speaks of the power of a body, he is speaking of its reality, how real it is. This is determined by its effects, and, more precisely, its capacity to perform several acts and to affect the surrounding world (other bodies), and in turn be affected in these encounters [29, II. P. 13.Schol. p. 40]. Therefore, the power and reality of an utterance cannot be reduced to the distinct idea of the utterance; an utterance is connected to some specific physical conditions. As Spinoza writes: ‘‘So the infant believes he freely wants the milk; the angry child that he wants vengeance; and the timid, flight. So the drunk believes it is from a free decision of the mind that he speaks the things he later, when sober, wishes he had not said’’ [29, II. Shol. p. 73]. We tend to make an abstraction from the functional mode of existence in which we produce ideas, but according to Spinoza, the idea and the sense of the idea (the mode of thinking) are clearly a variation of the substance.

#### We are obligated to increase our capacity to act, and to affect and be affected

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Spinoza does not refuse to locate the problem of freedom in the will connecting to the power of understanding; what he is concerned with is the necessary relation between an idea and the expressive dimension of its mode of existence. When we say something we immediately affirm an actual existence, a mode of existence [29, II. p. 39]. The practice of ethics and the practice of epistemology operate on the same plane. Rather than tying ethics to the faculty of judgement (Kant), Spinoza introduces ethical difference as the difference between different modes of existence. An individual is seen as evil, slavish, and stupid if he remains impotent without being able to act. In contrast, our mode of existence is called good, free, rational, and strong if our mode of existence increases our capacity to affect and be affected. Producing adequate ideas increases our power to act. Our way of acting is not judged by transcendent principles, but from an immanent perspective that gives it strength, intensity, and joy particularly when achieved together with others (See Deleuze: Spinoza: Practical Philosophy, Chap. 6). Spinoza says: ‘‘By Virtue and Power I understand the same thing’’ [29, IV.Preface. D.8. p. 117]. Spinoza will not separate right from power. Spinoza rarely uses the term ‘power’ to refer to the possessive power of the mighty, but throughout his Ethics he refers to power as potentia, the power to actualize and produce beings and existence. This is also what so much captured Negri in his reading of Spinoza [24, chap. 11]. For Spinoza, it makes no sense to separate right from power because we cannot have a right to something we don’t have the power to actualize. He goes on to say that the strength and weakness of civil society rests on each person’s capacity to maintain his own power (conatus). Whereas this basic life-regulating dynamic in Hobbes leads to everyone at war against each other, for Spinoza this consubstantiality of virtue and power is a presupposition for each person’s ability to commune with others. To increase one’s power to think and to act increases one’s virtue as belonging to the same plane. One will seek to combine and exchange with others. It follows: ‘‘By Virtue and Power I understand the same thing’’ [29, p. 117].

#### Biggest priority is whether or not a mode of speech increases power and ability to affect and be affected by others//maybe this justifies util//maybe is an Augustine hijack

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A different mode of existence is connected to our actual bodily existence. The ‘good’ and the ‘useful’ are defined as that which supports the human body, and its capacity to be affected in the greatest number of ways, or that allows it to affect other bodies. The ‘good’ is a name to signify the forces of life, those forces that increase our power and joy. We are to be mindful. In most situations, we are determined not by reason, but by inadequate ideas based on passions, sad affects, illusions, and ideology. The practice of ethics is often a long apprenticeship of individuation, an apprenticeship to transform negative affects and passions into positive affects. This is the art of reacting and selecting in response to an affective effect, to actualize and organize potentials. Hence, ethical difference is a theory of knowledge that orientates itself from a possible set of immanent modes of functioning and their capacity. When it comes to freedom of speech, we should be very careful to look into the mode of being itself attached to the utterance, in what situation someone speaks, what is his power, and what is at stake in this utterance. We should be careful not to isolate the problem of freedom of speech to an opposition between our great enlightenment tradition, and to religious fundamen- talism and its dogmatic ideology. The difficult test lies in the power of the utterance itself, not only from our adversary, but also from our own mode of expression. What we should confront is the relation between the utterance and its mode of existence. Most often, utterances will appear on the ground of certain affects dominating one’s character. As Deleuze writes: Ethics judges feelings, conduct and intentions by relating them, not to transcendent values, but to modes of existences they presuppose or imply: there are things one cannot do or even say, believe, feel, think, unless one is weak, enslaved, important; and other things one cannot do, feel and so on, unless one is free or strong. A method of explanation by immanent modes of existences thus replaces the recourse to transcendent values. The question is in each case: Does, say, this feeling, increase our power of action or not? Does it help us come into full possession of that power? To do all we can is our ethical task properly so called’’ [5, p. 269].

#### Treating freedom of speech as an absolute right turns it into a transcendental ideal, making it an act of nihilism devoid 0f both meaning and power, and the object of your criticism.

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Treating freedom as a first cause releases it from the very praxis in which its power, and its weakness, as a freedom takes place. We can have freedom of speech as an ideal, but we should never treat the ideal as the way to proceed; we would end up treating freedom as a fiction. The challenge is to see how freedom of speech actually produces something. There is a great risk of this freedom metamorphicing into an ideological weapon producing mostly reactive sad passions, the act of nihilism. In the Danish debate in Jyllands-Posten over the Mohammed-drawings, any kind of objection against publishing them was immediately regarded as invalid. The argument of the ideal of freedom of speech was structured as a fundamental right. The more this freedom is elevated into an inviolable principle to be defended in every imagined situation, the more formal and abstract it becomes, and the more we come to resemble the fundamentalist we oppose. Freedom of speech should be a means to encourage an open discourse. Freedom of speech is automatically elevated above all kinds of concrete objections. The Swedish author Go ̈ran Rosenberg claims that freedom of speech implies a kind of ‘dynamic consensus’: a continuous harmoni- zation between citizens within a society, how freedom of speech can be used, and how we can conceive and grasp different kinds of utterances in a public sphere. An automatic reaction defending any kind of utterance in whatever situation can produce only sad effects because such an utterance has no adequate power. Freedom of speech is a constant matter of negotiations and questioning one’s own position, and, not least, the limit of one’s thought [26]. In the same vein, there is a need for introducing a critical account of the notion of liberalism [2]. The problem is that freedom of speech is treated as a trivial ideal. In reducing it to a formal idea, we will not be able to see what freedom of speech could be, what it can do. We need to assess bodily encounters otherwise it becomes almost impossible for us to test the very becoming of this freedom. The inadequate power of human rights, including freedom of speech, is also addressed by the French philosopher Alain Badiou in his Ethics. He writes: ‘‘The Law (human rights, etc.) is always already there. It regulates judgments and opinions concerning the evil that happens in some variable elsewhere. But there is no question of reconsidering the foundation of this ‘Law’, of going right back to the conservative identity that sustains it’’ [1, p. 33]. Addressing the deep consensus in our society about fundamental rights, Badiou nevertheless points towards the problem of referring to rights as a given ideology without having to face the singularity of each situation. Badiou focuses on how a consensus-based ethics, one that has increased its marketability in recent decades such that even large banks adopt codes that take morality and ethics into consideration, is cut off from the singularity of the situation. These cases are, as with the Mohammed-drawings, settled in advance. Our basic rights in society are treated as transcendent ideals. Human rights, Freedom of speech, Democracy, are all transformed into empty signifiers blind to what they presuppose, and what they exclude. Despite Badiou’s singular approach, he draws our attention to how we tend to argue when it comes to basic rights; We presuppose a natural human being to which we can attribute our rights, and we presuppose a hidden consensus about defining ourselves as ‘good people’, or as victims subjected to evil forces [1, p. 11]. An expressive notion on the other hand can never succumb to the pitfalls of this kind of nihilism. Freedom of speech as an efficient cause will never descend to a ‘negative freedom’; a freedom that can only be sustained when government refuses any kind of censorship. This will in part explain the weakness of the ideological treatment of Freedom of Speech; there is no positive substance to give it power. Each time freedom of speech is to be defended, we look for its imaginary opposition to motivate its existence. It is in this that power has become powerless in ordering freedom of speech. In our so-called liberal progressiveness, we are able to locate an attitude that advocates freedom of speech by always saying ‘yes’ to any possible use of freedom. This turns out to be a reactive, conservative mode. As Deleuze has emphasized in his book on Nietzsche, this automatic-affirmation-mechanism not only tells us the story of the powerlessness of those in power, it is basically a nihilistic attitude attributed to powerlessness: ‘‘It [the ass] always says yes, but does not know how to say no.’’ [...] ‘‘The ass can no more articulate affirmation than its ears can pick up—it and its echoes’’ [8, p. 168]. What looks like an inviolable principle to affirm the principle of freedom of speech is an affirmation based on a reactionary mode. As Deleuze concludes: ‘‘...the yes which does not know how to say no (the yes of the ass) is a caricature of affirmation. This is precisely because it says yes to everything which is no, because it puts up with nihilism it continues to serve the power of denying—which is like a demon whose every burden it carries’’ [8, p. 175]. This logic can also be detected among European countries in their treatment of human rights. Recently several European countries have adopted the ‘nation’ and the ‘nation’s identity’ as a basic value and a presupposition when dealing with migration. Values attributed to ‘the nation’ are being affirmed, and those persons who do not share these values are being excluded, or in some cases being stripped of their citizenship. The attempt to define so-called ‘Danish values’ uses the same kind of strategy. One affirms only through negation, only through what is not compatible with it. The Swiss have turned the question of the minaret, and whether a minaret is compatible with ‘Swiss values’, into the main election issue. Similarly, the French immigration minister Eric Besson has tried to connect the idea of French values and French identity to a prohibition against the Burka, even though most French are not against the Burka. This is the reactionary dimension of treating values and freedom in which one affirms something called ‘values’ (often conceptualized in a completely abstract way) by either negating the other, or negating what cannot be compatible with the adopted value. Nietzsche once constructed a critical concept of value defined as the question of what value a value has. This is what an expressive mode of freedom of speech does. In the above mentioned examples, we see a so-called critical concept of values being used to homogenize an ideal that has lost touch with the expressive mode of existence that makes up the power of values.

### Eltis

#### Regulation of hateful speech is necessary to uphold the legal rights and function of universities

Eltis 11, Karen. Hate Speech, Genocide, and Revisiting the “Marketplace of Ideas” in the Digital Age. LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW 2011 LAW JOURNAL CONFERENCE. APRIL 8, 2011. NP 1/18/17.

On point, a U.S. court dealing with antisemitic comments in the workplace recently opined that the accumulation of vilifying and derogatory comments creates an atmosphere of fear, silencing, and shame for victims exposed to this propaganda.23 Ultimately, it stands to reason that this sort of demonization leads to—and subsequently excuses—barbarous acts such as the firebombing of a Jewish school in Montreal24 and the horrific torture and murder of young Ilan Halimi in France, who was presumably targeted and brutalized simply because he was Jewish.25 With this in mind, democracies are duty-bound to take corrective action to not only prevent infringement of the freedom of speech of inciters (as most constitutional democracies and their institutions have done already), but also to protect victims’ affirmative rights to expression, dignity, equality, and, ultimately, life and security. In this case and in the balance of rights, the latter must prevail.26 In the words of Professor Shalom Lappin: “If one group of students is permitted to engage in violent harassment of another without the decisive intervention of the University’s administration, then the conditions for a free and unfettered exchange of ideas are completely undermined, and the primary purpose of university life is betrayed.”27

#### Only limitations of certain kinds of speech can uphold the initial function of the constitution

Eltis 11, Karen. Hate Speech, Genocide, and Revisiting the “Marketplace of Ideas” in the Digital Age. LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW 2011 LAW JOURNAL CONFERENCE. APRIL 8, 2011. NP 1/18/17.

If constitutionalism is to serve the purpose for which it was intended—to safeguard substantive democracy—we must not be fooled by the cynical invocation and manipulation of human rights values. History teaches the importance of the precautionary principle as it relates to incitement to hatred against historically vulnerable and unpopular groups. The Canadian Supreme Court has embraced this view by upholding carefully drafted anti-hate provisions. It bears repeating that in Canada, the willful promotion of hatred under certain circumstances is deemed a justifiable and proportional limit on free expression in light of its deleterious effects upon the dignity and equality of the vulnerable and society as a whole. The hope is not to criminalize hate speech elsewhere per se, but to raise awareness of the problem and to prompt meaningful intervention. The current challenge for political leaders, university administrators, and, generally, civil society, is to prevent constitutionalism from being undermined by the very narrative it conceived.

#### The internet is a vehicle for hate

Eltis 11, Karen. Hate Speech, Genocide, and Revisiting the “Marketplace of Ideas” in the Digital Age. LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW 2011 LAW JOURNAL CONFERENCE. APRIL 8, 2011. NP 1/18/17.

The Internet, particularly the so-called Web 2.0,31 and information sharing via social networking, blogging, and similar innovative, interactive endeavors, only serve to radically compound the above- mentioned difficulties. The ability to reach and corrupt even the most educated32—let alone innocent—minds by distorting information respecting “race,” particular genocides, or the Holocaust itself, is amplified by the lack of editorial oversight online.33 It is indeed the medium’s very structure that tends to bestow the appearance of legitimacy and veracity on even the most mendacious of sites, in the absence of gatekeepers or other traditional controls.34 Therefore, as a medium, it may help legitimate the most pernicious forms of hate and incitement, if only due to the arduous task of distinguishing between reliable, authoritative cyber sources, and those peddling racism and fabrications,35 under the guise of respectability, that the networked environment uniquely imparts.

### Setiya on Murdoch

#### The structure of the world rather than the will makes certain actions obligatory – this resolves the shmagency objection

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

In reading The Sovereignty of Good, it will prove useful to start at the end of the first essay, not the beginning. What Murdoch works towards in “The Idea of Perfection” is an alternative to the picture of freedom on which the agent “chooses his reasons in terms of, and after surveying, the ordinary facts which lie open to everyone” (Murdoch 1970: 34). It is this picture that serves as common ground for her several antagonists — behaviourist, existentialist, and Kantian. And it is one that she rejects. I suggest [that] we introduce into the picture the idea of attention, or looking [...] I can only choose within the world I can see, in the moral sense of ‘see’ which implies that clear vision is the result of moral imagination and moral effort. [...] One is often compelled almost automatically by what one can see. (Murdoch 1970: 35–6) The place of choice is certainly a different one if we think in terms of a world which is compulsively present to the will, and the discernment and exploration of which is a slow business. [...] If I attend properly, I will have no choices and this is the ultimate condition to be aimed at. (Murdoch 1970: 38) In the stark formulation at the heart of the following essay, “realism [...] is a kind of intellectual ability to perceive what is true, which is automatically at the same time a suppression of self [...] true vision occasions right conduct” (Murdoch 1970: 64). That Murdoch makes these striking claims is sometimes recognized. What is less well understood is why they matter. We can bring this out by finding the disputed conception of choice in the background of section 1. The picture of freedom as autonomy, not determined by the plain facts of one’s circumstance, is shared by rationalists of different kinds, by instrumentalists and Kantians alike. The problem of moral reasons could be solved by giving it up. In raising this problem, we imagined someone who is fully aware of the circumstance that requires h[er]im to offer help, of serious need and modest cost, but who remains unmoved. The task that looked difficult, within the confines of ethical rationalism, was to explain why he should be moved, why these facts provide him with reasons to act. We must trace the necessity of being moved to the nature of the will. Murdoch’s intervention is to find an alternative view. For Murdoch, the necessity of being moved by moral reasons lies not in the nature of the will but in the motivational import of cognition. Despite appearances, the agent we imagined is impossible. One cannot fail to be moved by an adequate conception of the facts that require a response: “true vision occasions right conduct”. There is thus no need to enter the maze of options in which we got lost before.

#### My fw = more motivational than rationalism

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

According to a simple version of this idea: Hyper-Internalism: If the fact that p is a reason for A to f, and A knows that p, A is moved to f in proportion to its strength as a reason. Murdoch’s final view is more complex. But the simple formulation brings out some crucial points. First, in the usual contrast between judgement and existence internalism, between claims about the motivational significance of thinking that there is reason to f and motivational conditions on the existence of reasons, Murdoch’s internalism falls on the side of existence.23 It follows from something’s being a reason to f, according to the hyper-internalist, that if one knows the fact that is a reason, one is suitably moved. We need not add the further condition that one believes this fact to be a reason. Second, Hyper-Internalism is vastly stronger than Internalism about Reasons. It is not just the capacity to be moved but actual motivation that follows from knowledge of reasons. Finally, the truth of Hyper- Internalism does not tell us what there is reason to do. It does not imply that facts about the needs of other people provide us with reasons to act. Its role is not to support an argument for that claim but to prevent it from being threatened by ethical rationalism. If facts of this kind justify action, it follows that we are moved by the relevant beliefs. We need not derive their status as reasons, considerations by which we are moved insofar as we are rational, from the aim of agency, as such. Ironically, by tightening the connection between cognition and choice, we make this connection in one way easier to defend: it need not go through the metaphysics of the will.24

#### Action is constituted through social understanding, but neglect of the importance of internal reflection can not explain moral behavior and comprehension of the world

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

A key to the structure of Sovereignty is that Murdoch anticipates this complaint.29 In the first half of “The Idea of Perfection”, the part whose targets can seem distant from us, Murdoch criticizes a “genetic” analysis of mental concepts that derives from a broadly behaviourist reading of Wittgenstein. On the genetic theory, “[mental] life is, and logically must be, a shadow of life in public” since, in general, “the possession of [a] concept is a public skill” (Murdoch 1970: 7, 11). Murdoch illustrates this theory with the concept of decision.

How do I learn the concept of decision? By watching someone who says ‘I have decided’ and who then acts. How else could I learn it? And with that I learn the essence of the matter. I do not ‘move on’ from a behaviouristic concept to a mental one. [...] A decision does not turn out to be, when more carefully considered, an introspectible movement. The concept has no further inner structure; it is its outer structure. (Murdoch 1970: 12–3) Although this is something of a caricature, the idea that mental and other concepts are anchored in their public use is not anachronistic. Versions of it are still proposed. What matters here is that theories of this kind support the charge against Moral Internalism. On the genetic theory, nothing that is not apparent in the public acquisition of a concept can be essential to its content. Someone who goes through the ordinary training, and who is competent by ordinary tests, has everything required to grasp the concept expressed by a word. Thus, the person we imagined in section 1 can know about his circumstance exactly what the virtuous person knows. He can know the facts that provide a moral reason without being moved. This is what Murdoch must deny, as she does in language echoed by McDowell: There are two senses of ‘knowing what a word means’, one connected with ordinary language, the other very much less so. [...] We do not simply, through being rational and knowing ordinary language, ‘know’ the meaning of all necessary moral words. (Murdoch 1970: 28) The question is: What is her argument? How does she dislodge the genetic theory and others like it, theories on which the objection to Moral Internalism goes through? The answer lies in a second key to Sovereignty: a correct interpretation of the example of M and D. The example itself is more frequently cited than anything else in the book. A mother, M, feels hostility to her daughter-in-law, D, finding her “pert and familiar, insufficiently ceremonious, brusque, sometimes positively rude, always tiresomely juvenile” (Murdoch 1970: 16–7). This does not affect M’s outward behaviour, which is perfect throughout. Yet she experiences moral progress: M “reflects deliberately about D until gradually her vision of D alters. [...] D is discovered to be not vulgar but refreshingly simple, not undignified but spontaneous, not noisy but gay, not tiresomely juvenile but delightfully youthful, and so on” (Murdoch 1970: 17). We are to imagine the case as one in which philosophers’ imprint M’s vision of D becomes more loving and more just, so that something of moral significance has gone on. What is the point of this example? Because two issues are run together, one of them is easy to miss.30 It is obvious that Murdoch is contesting the neglect of private moral activity by the behaviourist obsessed with outward deeds. But this is only part of it. More important is the nature of M’s activity, which is refining the way in which she sees the world. Her grasp of the concepts with which she operates — pert, ceremonious, undignified, gay — is transformed and improved, and her descriptions change accordingly. It is this phenomenon, in which one’s understanding of a concept goes beyond what one knew in acquiring it, or being competent by ordinary tests, that the genetic theorist cannot comprehend. The argument against the genetic theory is that the phenomenon is real: full possession of a concept can transcend the mastery of its public use. The example of M and D is supposed to make this vivid. Innocent of theory, Murdoch believes, we will be tempted to describe the case as one of progress towards perfection in the grasp of mental concepts.

#### Ethics is not merely a process of learning new information about a subject, but rather of developing certain orientations

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

It might be argued, instead, that the story is one of progress towards perfection in understanding another person. But there is no conflict here: we can say that, too. And we have to read Murdoch as concerned with grasp of concepts in order to make sense of her book. The example of M and D is framed by the genetic theory, and its insights are applied to repentance and love.31 In each case**, her topic is conceptual mastery, and it is this topic, perhaps among others, to which** the example speaks. Murdoch’s conclusion makes this clear: **The entry into a mental concept of the notion of an ideal limit destroys the genetic analysis of its meaning.** **[...] Is ‘love’ a mental concept, and if so can it be analysed genetically? No doubt Mary’s little lamb loved Mary,** that is it followed her to school; and in some sense of ‘learn’ we might well learn the concept, the word, in that context. **But with such a concept that is not the end of the matter. [...] A deepening process, at any rate an altering and complicating process, takes place**. (Murdoch 1970: 28) Though it is not my purpose to defend her view, Murdoch surely has a point. Her descriptions of concept-possession ring true. We say that our understanding of repentance and love has grown, not merely that we have learned new facts about them.32 If we are right to do so, the genetic theory is wrong. The objection to Moral Internalism thus cannot rely on the genetic theory, or anything like it, for support. There is room for the view that, while someone may appear to be unmoved by knowledge of decisive moral reasons, their grasp of these reasons is imperfect, since they do not possess the relevant concepts in full.

#### Thick moral concepts = good?

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

Here we reach a third key to Sovereignty: the false assimilation of Murdoch’s theory to an emphasis on “thick moral concepts” such as “coward, lie, brutality, gratitude” in which description and evaluation are ineluctably bound together (Williams 1985: 140). Bernard Williams, who makes a great deal of such concepts in Ethics and the Limits of Philosophy, credits his appreciation of their importance to a seminar taught by Philippa Foot and Murdoch in the 1950s (Williams 1985: 218n.7). For Williams, thick moral concepts are distinctive in being at once “world-guided” and “action-guiding”. They are world-guided in that there are necessary limits to divergence in their use. Those who grasp the relevant concepts are bound to agree in their application, except at the margins (Williams 1985: 140–1). In this respect, they are meant to differ from “thin” concepts like ought and good, though the difference is presumably one of degree (Williams 1985: 151–2).33 Thick concepts are action-guiding in that they are “characteristically related to reasons” and because one cannot grasp them unless one shares, at least through imagination, their evaluative point (Williams 1985: 140–2). In possessing a thick moral concept, one participates, perhaps vicariously, in a sensibility that may have motivational force. In effect, it is through this sensibility that users of the concept are able “go on in the same way”: this is how motivation or affect is built into the concept.

#### The only way to recognize the moral significance of others as moral beings rather than things is through recognition of the needs, wishes, and personhood of others

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

More significantly, Murdoch’s focus is not on the concepts with which we describe our options — just, courageous, cruel — and whose application guides action, but on the concepts with which we describe our circumstance and the people with whom we interact. Think back to M and D. What the mother gains is not a deeper apprehension of her own moral character, or of her behaviour, but of her daughter-in- law and what she is really like. Nor does Murdoch confine herself to concepts that carry a specific valence, positive or negative, like the ones on Williams’ list. As becomes increasingly clear in the second essay of Sovereignty, the knowledge that constitutes virtue is not knowledge of the Good, or even of particular virtues, but of the real existence of other people: “The more the separateness and differentness of other people is realized, and the fact seen that another man has needs and wishes as demanding as one’s own, the harder it becomes to treat a person as a thing” (Murdoch 1970: 64).

#### To grasp certain facts or aspects of the empirical world is to appreciate and understand an appropriate response required by ethics.

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

No doubt these proposals raise questions of their own. Perhaps the result is to make the epistemology of the mental more mysterious than it seemed. We won’t pursue that issue here. Our task is to find in Murdoch a theory of concepts that makes sense of Moral Internalism. She rejects the genetic theory, and her claim is not merely about thick concepts but about the whole range of thoughts with which we articulate our social world. What account does she give? The clue to Murdoch’s picture lies in the invocation of “realism”, which we encountered in section 1. In a Platonic mode, Murdoch connects the realism of virtue with the “appreciation of beauty in art and nature”, which is “a completely adequate entry into (and not just analogy of) the good life, since it is the checking of selfishness in the interest of seeing the real” (Murdoch 1970: 63).36 Great art shares in the exactness and objective attention Murdoch associates with morals. The same is true of technai in general: in an intellectual discipline, “I am confronted by an authoritative structure which commands my respect. [...] Attention is rewarded by a knowledge of reality” (Murdoch 1970: 87). And in the most general formulation of all: “The necessity of the good is then an aspect of the kind of necessity involved in any technique for exhibiting fact” (Murdoch 1970: 64). It is possible to extract from these increasingly abstract claims a Platonic theory of concepts and concept-possession.37 This theory appliestoallconcepts,notjusttothosewhicharemorallyrelevant:“Are there forms of mud, hair and dirt? If there are then nature is redeemed into the area of truthful vision. (My previous argument assumes of course, in Platonic terms, that there are.)” (Murdoch 1970: 86) In outline, the theory is this: each concept is associated with norms for its proper use, both practical and theoretical; these norms describe when the concept should be applied and what follows from its application, both cognitively and in relation to the will; to grasp a given concept is to approximate, in one’s dispositions of thought, a conformity with these norms. **Concept-possession thus comes by** degree and points to a limit we may never reach: **perfect compliance with the norms by which our concepts are defined.**

#### If reason accounts for our understanding of certain concepts, then only a platonic account of the necessary responses required by reason can make sense of normativity

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

This picture of concepts is related to Davidson’s “constitutive ideal of rationality” and to the “normativity of the intentional”. A more recent Platonist, Ralph Wedgwood, makes a similar claim: [The] doctrine that the intentional is normative can be viewed as a way of cashing out Plato’s metaphor that the Form of the Good is to the understanding what the sun is to vision (Republic, 507b–509a). We count as sighted because we are appropriately sensitive to light, the ultimate source of which is the sun; in a similar way, we count as thinkers because we are appropriately sensitive to normative requirements, the source of which is a coherent system of eternal and necessary truths about what we ought to think or do or feel. (Wedgwood 2007: 3) On the Platonic theory, we must respond to the norms of reason, at least by approximation, in using the concepts we do. They are at once a condition of thought and an ideal to which we aspire.38 The “necessity involved in any technique for exhibiting fact” is the necessity of this aspiration and this ideal, a necessity involved in any attempt to depict reality as it is.

#### Only a platonic account of the good can make sense of moral motivation – rationality alone can not account for the necessity of the full cognition of facts in appreciating the importance of ethical action

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

This argument does not tell us what there is reason to do. In particular, it does not tell us that the needs of other people provide us with reasons to act. If there are such reasons, however, it follows from the Platonic theory that the corresponding norms are built into our concepts. When there is decisive moral reason to act in a certain way, knowledge of that reason, including ideal grasp of the concepts it involves, entails decisive motivation. Moral Internalism holds. This argument answers the question “Why be moral?” not by showing that there is reason to do what is right, or by persuading the amoralist, but by avoiding the dilemma posed in section 1. Even if the argument for ethical rationalism goes through, we can save the generality of moral reasons without deriving their existence from the nature of the will. On the Platonic theory of concepts, there is another possibility: that rational agents are moved by such considerations because they are reasons — or so we assume against the sceptic — and because rationality belongs to full cognition of the facts.

Idea – takes out kant b/cuz to understand a concept is to understand it in its application through full cognition of the facts, which precludes ability to abstract to a universalizeable maxim since it loses the necessary component to make ethics universalizable

#### My framework recontextualizes what constitutes rationality and reason – only this understanding bridges the ought-ought gap

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

This reading makes sense of much that is obscure in The Sovereignty of Good, from the role of the genetic theory, through Murdoch’s realism, to her conception of choice. But it leaves a number of loose ends. One is specific to the context in which I have placed Murdoch’s views. I have argued that she avoids the problem of moral reasons as it afflicts the ethical rationalist. But this may be too quick. The truth of rationalism would constrain what constitutes a norm of practical reason. Do the norms involved in our possession of concepts, according to Murdoch’s Platonism, meet this constraint? We can put the problem this way: **According to the Platonic theory, concepts are associated with norms to which we must approximately conform, ideal possession of a concept involves full conformity**, and this is the standard of ideal rationality. According to ethical rationalism, to be practically rational is to achieve the aim or end of agency, as such. We thus have two potentially conflicting views of practical rationality. But we can reconcile their claims. **If ideal rationality is full conformity with the norms inscribed in our concepts, and to be practically rational is to achieve the aim or end of agency**, as such**, the aim of agency must be to grasp the concepts with which to describe our circumstance.** Though she is not explicit about it, this may be Murdoch’s view. She conceives attention as “a just and loving gaze directed upon an individual reality” and calls this “the characteristic and proper mark of the active moral agent” (Murdoch 1970: 33). As she goes on to say, this is both “a logical and a normative claim”: it has the same dual character as the aim of agency, for the ethical rationalist, which bridges the is-ought gap. On this interpretation, while Murdoch offers something like “the reverse of Hampshire’s picture”, she agrees, in a way, with the only explicit ‘ought’ in his psychology. We ought to know what we are doing. We should aim at total knowledge of our situation and a clear conceptualization of all our possibilities. (Murdoch 1970: 7) The difference is in how she conceives such knowledge, not as a matter of public, impersonal fact, but as the object of just perception, and not as expanding our range of possibilities, but as closing them off without precluding freedom, so that right conduct is assured. The “ought” of attention to social reality by which our thoughts are perfected is the “ought” of agency or practical reason and the “ought” of meeting the norms by which our concepts are defined.40

#### Only the platonic/Augustinian account of ethics can account for a peron with an understanding of moral concepts that chooses to act wrongly///maybe this can be a takeout to k affs about how it’s just a question of saying we’re doing the right thing but of actually orienting ourselves towards the good

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

Finally, the Platonic theory casts light on Murdoch’s attitude to defective concepts and conceptual change. Suppose that possession of a putative concept involves being disposed to think or react in immoral ways: the concept is one that a virtuous person would not have. Examples might be chastity or self-denial. It is an implication of Murdoch’s view that such putative concepts fail. Since the norms definitive of any concept are norms of reason, genuine concepts cannot be in this way flawed.42 Those who use the relevant words may appear to be thinking, but they are not. It is consistent with this that our present concepts are limited, that there are facets of reason to which they afford no access, and that there is pressure for us to revise and extend our thoughts.

#### **Only intellectual change within the realm of philosophy through the utilization of an Augustinian ethic can enable moral progress;**

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

Moral tasks are characteristically endless not only because ’within’, as it were, a given concept our efforts are imperfect, but also because as we move and as we look our concepts themselves are changing. (Murdoch 1970: 27) We may need new and better concepts in order to comprehend our reasons, to bring into view the facts for which Moral Internalism holds. This opens an extraordinary possibility. If new concepts make available new facts, knowledge of which is inextricable from choice, philosophy can make moral progress through intellectual change. In the last two essays of Sovereignty, Murdoch insists on the practical nature of her project: “How can we make ourselves better? is a question moral philosophers should try to answer.” (Murdoch 1970: 76) On the Platonic conception, they can. As Murdoch wrote in “Vision and Choice in Morality”: Great philosophers coin new moral concepts and communicate new moral visions and modes of understanding. [...] From here we may see that the task of moral philosophers has been to extend, as poets may extend, the limits of language, and enable it to illuminate regions which were formerly dark. (Murdoch 1956: 42, 49) Given Moral Internalism, the extension of language and thought can constitute moral improvement. Nor does Murdoch simply observe this prospect. In the parts of her book that seem most unorthodox, their rhetoric most high-flown, she tries to enact it, to rehabilitate the concept of the Good, neglect of which is a moral, not just an intellectual, vice: “The image of the Good as a transcendent magnetic centre seems to me the least corruptible and most realistic picture for us to use in our reflections on the moral life.” (Murdoch 1970: 73) Against the background of the Platonic theory, we can explain what Murdoch is philosophers’ imprint – 15 – doing in these passages, why it matters to moral philosophy, and how it constitutes a form of proof.

#### A focus on ideal context-devoid rationality can not be the basis for our understanding of ethics – the Platonic/Augustinian account of moral knowledge is best

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

I think we can understand what Murdoch wants here by noting how much the Platonic theory leaves open. According to this theory, each concept is associated with norms for its proper use. In order to grasp a given concept, one must satisfy these norms, at least to some degree. But there is room for more complete possession of a concept, for one to approach perfection by meeting its norms in full. Nothing in this account rules out the following possibility: that the norms for concept F and concept G are incompatible, that we cannot perfect our grasp of both. Suppose, for instance, that one act falls under F, another under G. Knowledge that an act is F, with full grasp of the concept, entails decisive motivation: the fact that the act is F is a decisive reason to perform it. At the same time, knowledge that an act is G, with full grasp of the concept, entails decisive motivation: the fact that the act is G is a decisive reason to perform it. It follows that one cannot fully grasp both facts, since one cannot meet both norms. The result is a kind of fragmentation in reason. This description may harbour some hidden incoherence, but it does not conflict with the letter of the Platonic theory. All that is implied is that the standard of ideal rationality in the possession of every concept is unattainable. There are tragedies in which we have decisive reason to do incompatible things. Whether this is true or not is, for Murdoch, a real question: “The notion that ‘it all somehow must make sense’, or ‘there is a best decision here’, preserves from despair; the difficulty is how to entertain this consoling notion in a way which is not false” (Murdoch 1970: 55). If the Good exists, the norms involved in our concepts are compatible: there are no tragedies in which, whatever one does, one acts against a decisive reason. There philosophers’ imprint – 16 – is always a right decision, one that satisfies the norms involved in every concept that applies to one’s circumstance. Belief in the Good is expressed in “the idea [...] that the lines really do converge” (Murdoch 1970: 97): the lines traced out by the norms of each concept, which converge in the Good. “For all our frailty the command ‘be perfect’ has sense for us” (Murdoch 1970: 90). Perfect grasp of every concept may be psychologically out of reach, but it is not impossible.

#### Attention to the good is a source of moral energy

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

Belief in the Good is a protection against despair because it tells us that every problem can be solved. But the consolation may go further. At times, Murdoch suggests that faith in the Good is a recognition of “the absolute pointlessness of virtue [and] its supreme importance”, that “nothing in life is of any value except the attempt to be virtuous” (Murdoch 1970: 84–5). The unity here is not just that of a right decision, one that responds to every fact, but that if one makes this decision, nothing else matters: there is no cause for regret or dismay; all other reasons are “silenced”.44 Murdoch emphasizes, too, that while it may be difficult, “contemplation of the Good [is] a source of uncontaminated energy, a source of new and quite undreamt-of virtue” (Murdoch 1970: 99). It is a “psychological fact, and one of importance to moral philosophy, that we can all receive moral help by focusing our attention upon things which are valuable: virtuous people, great art, perhaps [...] the idea of goodness itself” (Murdoch 1970: 54–5).45

#### Understanding of the good is a source of moral motivation//k interaction??

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

Looking back to the end of section 3, let us begin with this: According to Murdoch, we can become morally better by seeing the world in light of the Good. Murdoch offers this concept precisely as a source of “moral help” and “uncontaminated energy”. In a way, there is no mystery here. It is not mysterious what we gain from belief in the Good or how it can affect our actions, if Murdoch is right. This belief is a source of moral motivation. The puzzle is what this has to do with the existence of the Good. Why should practical reasons for using a concept or holding a belief show that the concept is not empty or that the belief is true? Murdoch is adamant that hers “is not a sort of pragmatism or a philosophy of ‘as if’” (Murdoch 1970: 72–3). We should not simply pretend that the lines converge; we are justified in thinking that they do. In order to make sense of this, we need to say more about the concept of the Good. To think in terms of this concept—of the perfection of thought, as such — is to interpret the norms involved in other concepts as parts of a coherent whole. Among the norms that define the concept of the Good itself are these: from the fact that the norms of a concept require some response, infer that it is required by the Good; and from the fact that the Good requires some response, infer that no other response can be required. If we reason in this way, we will conclude that the norms of every concept are consistent in practice with the norms of every other. We will be committed to the resolution of conflict. When the demands of disparate concepts appear to come apart, we will regard the tension as merely apparent, revising our use of these concepts until it gives way. The idea of the Good thus operates as a regulative ideal for our changing conceptual grasp.

#### A2 Rule Following Paradox//the idea of one unified understanding of application of different concepts is unnecessary

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

With the example of M and D, Murdoch shows how our grasp of mental concepts can deepen and grow, how it can transcend what was apparent in their acquisition. She goes on to make a more startling claim, which she repeats more than once, that “the movement of understanding is onward into increasing privacy” (Murdoch 1970: 28). philosophers’ imprint – 18 – Murdoch insists that the language of moral reasons is “unavoidably idiosyncratic and inaccessible” (Murdoch 1970: 33). There is no single end-point to the perfect grasp of mental concepts: there may be several ways to apply a concept, and to respond to its use, that are equally and perfectly ideal. As we evolve in different ways, we may become increasingly unintelligible to one another, without any of us having gone wrong.47 This feature of Murdoch’s view makes her opposition to the genetic theory, with its emphasis on public standards, especially sharp. But it is not essential to it: a Platonist for whom each concept has a single perfect form would still deny the genetic theory and could argue for Moral Internalism in the same way. And it is potentially at odds with Murdoch’s second Platonism, about the unity and reality of the Good, which stresses convergence, not idiosyncrasy. Is there a contradiction here? In my view, there is not: the appearance of conflict is superficial. To believe in the Good is to believe that one can perfect one’s grasp of every concept. It is not to believe that there is just one way of doing so. Belief in the Good is thus consistent with the privacy of perfect understanding. Still, on my reading, the doctrine of privacy can be severed from the rest of Murdoch’s view: it does not follow from her central claims.

#### Only through love can we appreciate the realness of other agents/a2 ks that mistake love with affection

Setiya 13 summarizes Murdoch, Kieran. *Murdoch on the Sovereignty of Good*. Volume 13, no. 9 may 2013. NP 1/25/17.

Murdoch’s theory of love is initially puzzling. Why should accurate perception of another, even with perfect grasp of the concepts applied, go along with love, not loathing or contempt? Suppose D really were tiresome and juvenile, or, if those are defective concepts, consider the “clear-eyed contemplation of the misery and evil of the world” (Murdoch 1970: 59). Must the agents of evil be objects of love? Murdoch’s thought is that they must. The air of paradox in this claim can be dissolved in part by recalling that the love in question is not selective — it is not fondness or affection or the desire for intimacy — but love as a moral emotion.48 (The example of M and D is misleading in this respect. It is an accident that the object of M’s loving gaze is her daughter-in-law, not a murderer or an acquaintance at work.) The love that interests Murdoch is the love one should have for one’s neighbour — that is, for anyone with whom one interacts.49 If love in this sense is partial, that is only because we are limited. “Love is the extremely difficult realisation that something other than oneself is real” (Murdoch 1959: 215). Since everyone is real, we ought to love them all. It does not follow from this that we should feel affection for everyone or that we should pursue their interests. Love involves “true vision” and leads us to act towards others as we are morally required to act. It might be out of love that we prevent them from doing harm, or berate them, or refuse to associate with them.

### Altman

#### Hate speech intrinsically aims to subordinate minorities

Altman 93, Andrew. Liberalism and Campus Hate Speech: A Philosophical Examination. Ethics, Vol. 103, No. 2 (Jan., 1993), pp. 302-317

Treating persons as moral subordinates means treating them in a way that takes their interests to be intrinsically less important, an their lives inherently less valuable, than the interests and lives of th who belong to some reference group. There are many ways of treating people as moral subordinates that are natural as opposed to convention the status of these acts as acts of subordination depend solely on universal principles of morality and not on the conventions of a given society. Slavery and genocide, for example, treat people as having inferior moral standing simply in virtue of the affront of such practices to universal moral principles. Other ways of treating people as moral subordinates have both natural and conventional elements. The practice of racial segregation is an example. It is subordinating because the conditions imposed on blacks by such treatment violate moral principles but also because the act of separation is a convention fo (supposedly) proper, subordinate place. I believe that the language of racist, sexist, and homophobic slurs and epithets provides wholly conventional ways of treating people moral subordinates. Terms such as 'kike', 'faggot', 'spic', and 'nigger' are verbal instruments of subordination. They are used not only to express hatred or contempt for people but also to "put them in their place," that is, to treat them as having inferior moral standing.

#### The intrinsic wrong of hate speech justifies regulation

Altman 93, Andrew. Liberalism and Campus Hate Speech: A Philosophical Examination. Ethics, Vol. 103, No. 2 (Jan., 1993), pp. 302-317

I have argued that some forms of hate speech treat their targets as moral subordinates on account of race, gender, or sexual preference. Such treatment runs counter to the central liberal idea of persons as free and equal. To that extent, it constitutes a wrong, a speech-act wrong inflicted on those whom it addresses. However, it does not follow that it is a wrong that may be legitimately targeted by regulation. A liberal republic is not a republic of virtue in which the authorities prohibit every conceivable wrong. The liberal republic protects a sub- stantial zone of liberty around the individual in which she is free from authoritative intrusion even to do some things that are wrong. Yet, the wrongs of subordination based on such characteristics as race, gender, and sexual preference are not just 'any old wrongs. His- torically, they are among the principal wrongs that have prevented- and continue to prevent-Western liberal democracies from living up to their ideals and principles. As such, these wrongs are especially appropriate targets of regulation in our liberal republic. Liberals rec- ognize the special importance of combating such wrongs in their strong support for laws prohibiting discrimination in employment, housing, and public accommodations. And even if the regulation of speech-act subordination on campus is not regarded as mandatory for universities, it does seem that the choice of an institution to regulate that type of subordination on campus is at least justifiable within a liberal framework.

#### Here is a hate speech counterplan

Altman 93, Andrew. Liberalism and Campus Hate Speech: A Philosophical Examination. Ethics, Vol. 103, No. 2 (Jan., 1993), pp. 302-317

If I am right in thinking that the slurs and epithets of hate speech are the principal instruments of the speech-act wrong of treating some- one as a moral subordinate and that such a wrong is a legitimate target of regulation, then it will not be difficult to formulate rules that have a reasonably good fit with the wrong they legitimately seek to regulate. In general, what are needed are rules that prohibit speech that (a) employs slurs and epithets conventionally used to subordinate persons on account of their race, gender, religion, ethnicity, or sexual preferences (b) is addressed to particular persons, and (c) is expressed with the intention of degrading such persons on account of their race, gender, religion, ethnicity, or sexual preference. With some modification, this is essentially what one finds in the regulations drafted by Grey for Stanford. Restricting the prohibition to slurs and epithets addressed to specific persons will capture many speech-act wrongs of subordination. But it will not capture them all. Slurs and epithets are not necessary for such speech acts, as I conceded earlier. In addition, it may be possible to treat someone as a moral subordinate through a speech act, even though the utterance is not addressing that person. However, prohibiting more than slurs and epithets would run a high risk of serious over- inclusiveness, capturing much speech that performs legitimate speech acts sch as stating and arguing. And prohibiting all use of slurs and epithets, whatever the context, would mandate a degree of intrusiveness ￼into the private lives of students that would be difficult for liberals to license. The regulation should identify examples of the kinds of terms that count as epithets or slurs conventionally used to perform speech acts of subordination. This is required in order to give people sufficient fair warning. But because the terms of natural language are not precise, univocal, and unchain, it is not possible to give an exhaustive list, nor is it mandatory to try. Individuals who innocently use an epithet that conventionally subordinates can lead lack of the requisite intent. The intent requirement is needed to accommodate cases in which an epithet or slur is not used with any intent to treat the addressee as a moral subordinate. These cases cover a wide range, including the efforts of some minorities to capture and transvalue terms historically used to subordinate them. There are several different ways in which the required intent could be described: the intent to stigmatize or to demean tor to insult or to degrade and so on. I think that ‘degrade’ does the best job of capturing the idea of treating someone as a moral subordinate in language the average person will find familiar and understandable. ‘Insult’ does the poorest job and should be voided. Insulting someone typically does not involve treating the person as a moral subordinate. Rather, it involves putting someone down in other ways: as less skillful, less intelligent, less clever, and the like.

#### This regulation would allow frequent expression

Altman 93, Andrew. Liberalism and Campus Hate Speech: A Philosophical Examination. Ethics, Vol. 103, No. 2 (Jan., 1993), pp. 302-317

Because of these differences, regulations that target speech-act subordination can accommodate the liberal concerns underlying view- point-neutrality, while regulations that sweep more broadly cannot. Consider the important Millian idea that individual development re- quires that people be left free to say things that are wrong and to learn from their mistakes. Under the sort of regulation I endorse, people would be perfectly free to make racist, sexist, and homophobic assertions and arguments and to learn of the deficiencies of their views from the counterassertions and counterarguments of others. And the equally important Millian point that public dialogue gains even through the expression of false ideas is accommodated in a similar way. Whatever contribution a racist viewpoint can bring to public discussion can be made under regulations that only target speech-act subordination.

#### Misuse of hate speech regulations is highly unlikely

Altman 93, Andrew. Liberalism and Campus Hate Speech: A Philosophical Examination. Ethics, Vol. 103, No. 2 (Jan., 1993), pp. 302-317

Still remaining is the problem of precedent: even narrowly drawn regulations targeting only speech-act subordination could be cited as precedent for more sweeping, antiliberal restrictions by those at other universities or in the community at large who are not committed to liberal values.33 In response to this concern, it should be argued that narrowly drawn rules will not serve well as precedents for would-be censors with antiliberal agendas. Those who wish to silence socialists, for example, on the ground that socialism is as discredited as racism will find scant precedential support from regulations that allow the expression of racist opinions as long as they are not couched in slurs and epithets directed at specific individuals.

### Seglow

#### Self-respect is a necessary component of agency of both oneself and others

Seglow 16, Jonathan. Hate Speech, Dignity and Self-Respect. Ethic Theory Moral Prac (2016) 19:1103–1116 DOI 10.1007/s10677-016-9744-3. July 10, 2016. (bracketed for grammar)

John Rawls (1999), Axel Honneth (1995), Robin Dillon (1997) and other writers agree that self-respect has enormous moral importance as a normative lens which structures individuals’ most basic perception of themselves. Moreover, self-respect is not just a constitutive part of a flourishing life, it also seems extrinsically important as [and] a component of values such as personal autonomy, or successful relationships with others. I understand self-respect as a person’s normative evaluation of her personhood, rights, status, character, situation, achievements, and so on. My focus is on the appropriate and universalisable normative consideration involved in recognition respect; not the particular forms of self-appraisal of one’s talents, accomplishments and excellences of appraisal self-respect (cf. Darwall 1977). Unlike self- esteem, where the criteria of evaluative appraisal are open and thus potentially idiosyncratic (a person might esteem his own racism), a common view is that (recognition) self-respect is an inherently moralised notion. Individuals respect themselves on the basis of reasons, and self-respect’s moral nature means that those reasons are ones which third parties can in principle share. Suppose that A, a racist white person, claims to respect his own racism. Other things being equal, reasonable people have no reason to respect A for his racism. Though A might esteem his own racism, he cannot, on this definition, respect himself for it. In general, I suggest, the reasons A does have to respect himself are just those which B can reasonably endorse as a reason to respect him, and vice versa. Self-respect is a complex concept but I want to pick out two basic dimensions of the idea. The first dimension I shall call agency self-respect and the basic thought is that through authoring their lives, individuals come to appreciate the value of their own agency, which they therefore have reason to respect. One aspect of agency self-respect is deliberation on those aims and attachments which a person wishes to pursue. This serves a person’s self-respect because through such deliberation individuals recognises the independency their own person- hood (they are not instruments of others’ wills) and appreciate their liberty to pursue different options in life. The exercise of critical reflection helps individuals pursue aims and attachments which they value and endorse, rather than ones they regard as alien or worthless. As Rawls emphasises, an important aspect of (agency) self-respect is itself the successful pursuit of those aims, projects and attachments that agents endorses (Rawls 1999, pp.386–7). Pursuing one’s aims successfully involves skills such as planning, perseverance, self-reliance, negotiation, and co- ordination as agents overcome the challenges they inevitably face as they seek to realise their intentions in the world. Both these aspects of agency self-respect require others to respect us in various ways. Individuals need the liberty to deliberate in order to secure their own agency, and an array of options to pursue. More than that, we need our agency to be recognised by those with whom we interact in order to respect it ourselves: we need others positively to affirm that we are indeed competent agents, capable of deliberating, pursuing projects and claiming rights (cf. Honneth 1995, pp.107–21). It’s also worth noting that both these aspects of agency self-respect also have a collective dimension. Persons can deliberate together on what aims and ends they should jointly endorse and pursue, in a way that serves the self-respect of each of them; and in addition they can gain self-respect through pursuing aims or contributing to relationships together. Entitlement self-respect is a second dimension of self-respect and it refers to the reasons a person has to respect herself on the basis of the rights, liberties and institutional entitlements that are recognised by those with whom she interacts. The entitlement dimension thus also makes our self-respect vulnerable to the respect of others. A central part of entitlement self- respect is recognition of a person’s human rights. Our self-respect is maintained through others’ recognition of our rights to freedom of movement, freedom of conscience, and right to own property, for example. Beyond human rights, recognition of entitlements we enjoy as members of various institutions (states, firms, universities, clubs and churches for instance), which may be permissible rather than morally required, is also part of entitlement self-respect. Others’ recognition of a person’s institutional rights and entitlements signals that she is a member in good standing of the relevant institution; the expressive message of their being honoured is an important basis of self-respect. So too is the security which comes from the knowledge that one’s institutional rights can be practically relied upon. Our rights and entitlements typically protect our agency from third party interference and are thus (often if not always) necessary for adequate agency self-respect. Entitlement self-respect is also related to agency self-respect in a further way: our rights and entitlements often need to be actively claimed in order to be activated, and such claiming is an exercise of our agency.

#### Free speech does not have value as an individualistic enterprise. Understanding of it as a collective enterprise undermines the value of hate speech.

Seglow 16, Jonathan. Hate Speech, Dignity and Self-Respect. Ethic Theory Moral Prac (2016) 19:1103–1116 DOI 10.1007/s10677-016-9744-3. July 10, 2016. (bracketed for grammar)

The notion of free speech as a collective enterprise is the idea that it is an intersubjective phenomenon which connects speakers with receivers of speech who each have interests in free speech as a social practice.4 **The collective enterprise view contrasts with an individualistic approach which defines free speech and explains its value through either speakers’ interests in free expression or,** less commonly, **an audience’s interest in receiving the views of speakers.** C. Edwin Baker’s (2009) argument that speakers have an autonomy-based interest in disclosing their values to the world is an example of the former, while T. M. Scanlon’s (1972) argument that autonomous individuals have an interest in not having the free circulation of ideas interfered with by the state is an instance of the latter. In interpreting the practice of free speech as a collective enterprise I do not claim that that is essentially what free speech is, but I do seek to weaken the appeal of the individualistic view. J. S. Mill’s argument that freedom of speech is justified through its role in helping societies arrive at the truth, this having social utility, is perhaps the most famous instance of a collective enterprise view. Rather than employ Mill’s argument, however, I draw on recent work by Caroline West (West 2012; cf. Braddon-Mitchell and West 2004) which seeks to show how speakers’ and receivers’ interests are implicated in free speech, considered as a social practice. For West, freedom of speech at root is the freedom to communicate with another, and its value needs to be explained that way.5 For one thing, free speech has little value to a would be speaker who lacks the resources to convey her view to others, who has little self-confidence or who is silenced by a social climate hostile to her ideas (Braddon-Mitchell and West 2004, pp.444–5). Free speakers should have a fair opportunity to express their ideas. But suppose, she imagines, a person is able to express herself yet her audience simply does not understand what she has to say. This might be for a number of reasons including some which are the responsibility of the speaker herself. But non-comprehension can also arise because the audience lacks the practical reason to understand a speaker’s views or because a third party has intervened systematically to distort a speaker’s meaning. What West calls a minimal comprehension requirement requires that individuals do not prevent the comprehension of a speaker’s thoughts by other agents (2012, pp.226–7). This promotes free speech as a social practice which consists inter alia in the free circulation of ideas. Finally, on West’s third dimension of free speech, an audience might very well understand a speaker’s words, but choose utterly to ignore them. In that case there would be little point in individuals speaking to their audience in the first place. Our aim in free speech is to impart some view to an audience; for that aim to succeed they must attend to some degree to our speech, and to review their beliefs and desires in the light of it. The third dimension of free speech, on the collective enterprise view, thus implies a minimal consideration requirement (2012, pp.229–32). As West conceptualises it this requirement implies at least some kind of duty on listeners not, systematically and dogmatically, to block their ears to others’ speech, but to make at least some effort to evaluate the views imparted by speakers in a fair-minded way (West 2012, pp.230–2; cf. Braddon-Mitchell and West 2004, p.453).6 The collective enterprise view weakens the appeal of a purely expressive interest in free speech, one where the value of a speaker expressing her views can be spelled out solely by reference to her interests. The purely expressive interest just describes the freedom to cast one’s views out into the world, regardless of their uptake, or lack of uptake, by others. I don’t want to deny that there is some purely expressive value in free speech. Think, for example, of someone who values keeping a secret diary. But I do want to maintain that free speech is characteristically an inter-subjective communicative prac- tice. As soon as one is involved in communicating one’s views to others, if (as I believe) that is the point of free speech, then one needs to attend to the comprehension others have and the consideration they give to our views. More specifically, I suggest that in the case of hate speech there is little or no purely expressive interest because the archetypical point of hate speech is to communicate one’s hateful feelings to the victims of one’s speech, and often as well sympathetic third parties. Because hate speech attack its targets, it is actually quite important from the hate speakers’ point of view that their victims understand their hateful messages, and review their beliefs and self-perceptions in their light. If that is the case then hate speech, as a characteristic not idiosyncratic form of speech, cannot be properly evaluated without reference to the interests of both parties involved. A collective enterprise approach relates speakers’ and receivers’ interests internally; in contrast to an individualistic view which involves balancing these interests against each other in case where they conflict.

#### Hate speech constitutes an inordinate response to other agents by treating minorities as individuals with nothing worthy of saying or listening to

Seglow 16, Jonathan. Hate Speech, Dignity and Self-Respect. Ethic Theory Moral Prac (2016) 19:1103–1116 DOI 10.1007/s10677-016-9744-3. July 10, 2016. (bracketed for grammar)

With these points in mind, we can now consider how hate speech undermines self-respect in both its dimensions i.e. harms its victims whatever intrinsic wrong it may also consist in. As I noted, hate speakers rely upon their victims comprehending and considering their hateful views, else their speech would not have its intended effects. At the same time, hate speech denies that its victims have views which merit others’ comprehension and consideration, as an instance of its more general message that those victims are not properly members of the political community. This undermines agency self-respect in three ways. First, it sets back the interest minority citizens have in deliberation on their aims, insofar as having one’s views considered by others is necessary for such deliberation. Since critically reflecting on one’s aims is an exercise of agency, this gives hate speech’s victims less reason to value their agency. Second, by denying that minorities have views that are significant or worth considering, hate speakers also weaken those minorities’ reasons to have confidence in their aims and projects, insofar as the latter reflect their views. This weakens that aspect of agency self-respect which consists in the successful pursuit of aims one endorses, at least if we think that successfully pursuing one’s aims is harder if the views guiding those aims are disparaged by others. Third, hate speech deforms collective deliberation, since hate speakers do not recognise the capacity of minorities to contribute ideas for collective discussion, whether in the formal political domain or in workplaces, associations, universities and so on. The message of hate speech is that its victims have nothing worth saying, nothing worth listening to. Its perpetrators therefore fail to respect that dimension of their victims’ agency which consists in their standing to be co- deliberants in collective discussion, with something to offer that discussion.

#### Hate speech undermines minorities sense of entitlement to basic values and respect

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Hate speech also undermines its victims’ entitlement self-respect. Hate mongers do not just communicate a message about their victims’ views. They also claim, at least implicitly, that minorities do not really merit the basic civic entitlements which the majority of citizens enjoy. They say, for example, that ethnic minority students are too stupid to be at university, that Muslim citizens should be incarcerated as terrorists, that immigrants are a threat to ‘our way of life’ who should be sent back to their own countries, or that severely disabled people are better off dead. Hate speakers communicate the view that minorities, who are often already vulner- able and marginalised, are not members in full standing of society. In doing so, they launch an expressive assault on those minorities’ rights and entitlements. The core idea of entitlement self-respect is that one values the rights, liberties and entitlements one enjoys because they signal one’s civic belonging, because of the goods (e.g. education) they thereby secure, and because they are stable platform for the exercise of agency – and therefore a route to agency self-respect. Because hate speech denies (implicitly or explicitly) minority citizens’ rights, liberties and entitlements, it erodes the basis for the latter to have confidence in them, and therefore to value and respect their secure possession.

#### Hate speech undermines the self-respect of hate speakers

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Hate speech fails to respect its victims’ agency and entitlements. On the collective enterprise view, hate speakers are not casting their views out into the world, but rather putting them forward for consideration in the institutions they inhabit with others. Because their victims in those institutions reject the hateful message directed at them, they obviously have no reason to respect hate speakers’ insofar as they perpetrate hate speech: no reason to endorse projects which assault their interests; no reason to respect deliberation which results in hate, no reason to respect the entitlement to express hatred which assaults their self-respect. But we can go further, for this reasoning applies not just to the direct victims of speech. I claimed in Section 4 that self-respect has a transitive moral basis: the reasons a person has to respect herself are the same reasons others have to respect her, and vice versa. If this is correct, then third parties also have no reason to respect hate speakers’ for their hate speech. Third parties have no reason to respect those who abuse their entitlements and exercise agency in ways which directly sets back the interests of others in society. This is consistent with how we normally treat others’ failures of respect. We do not respect those who violate others’ rights, for example, at least in their role as rights violators. Thus insofar as the hate speakers’ self-respect is dependent on the respect of others, they have reason to respect themselves qua hate speakers.

### Cohen

#### Hate speech is distinct from shouting fire in a crowded movie theater

Cohen, Carl. FREE SPEECH AND POLITICAL EXTREMISM: HOW NASTY ARE WE FREE TO BE?\* Law and Philosophy7 (1989)263--279. © 1989 by Kluwer Academic Publishers.

a) The theater audience is captive, subjected against its will to the shout and the sequel. Not so any gathering for a Nazi parade. Those angered or offended are free to stay away, or to leave; they need have nothing to do with it. The panic in the theater traps and injures those who had come for reasons entirely unrelated to the shout. What is rea- sonably said in a theater depends, of course, upon what properly goes on there - an expectation reasonably imposed upon speech in the classroom as well. The shouted false alarm is not essentially speech in the theater at all; it is a warning of danger fraudulently given, no dif- ferent from the fraudulent ringing of a fire alarm bell. But concerning the audience any Nazi march may draw, all of this simply cannot be said. b) A shouted warning, or false alarm, permits no discussion. It is not the expression of opinion, but the signal for flight, giving no oppor- tunity for reasoned reply. The other day, in Ann Arbor, some criminal fool released a tear gas cannister in a theater! The audience was pre- sented with inescapable threat; it had no options. But we who find the Nazis hateful do have options; the Nazi demonstration may be an- swered with a counter-demonstration, as an anti-Contra demonstra- tion may be answered with a pro-Contra demonstration. What is evil may be exposed, refuted, in print or by voice, then or later. Demon- strations by bigots, Nazis or others, cannot threaten immediate calam- ity at all comparable to a false alarm in a crowded theater. c) The shouted alarm of fire is, by hypothesis, false. We would think very differently of an honest warning. No doubt Nazi views are also false - but being right is not a condition on which permission to demonstrate may be premised. If it were, who will decide who is right enough to speak? So true enough, there are words in some special circumstances which, because of the grave danger they present, cannot claim free speech protection - like the shouting of"Fire!" falsely in a theater. But a political demonstration, in a park or on a major avenue, is nothing like that.

#### Hate speech does not constitute an incitement to riot

Cohen, Carl. FREE SPEECH AND POLITICAL EXTREMISM: HOW NASTY ARE WE FREE TO BE?\* Law and Philosophy7 (1989)263--279. © 1989 by Kluwer Academic Publishers.

"But [the Nazi-blocker rejoins] you underestimate the seriousness of the threat this demonstration would immediately create. If the Nazis march with swastikas and brown shirts on Miami Beach they will almost certainly provoke a riot. Incitement to riot is a crime. When it is deliberate as in the case we envisage, when its violent consequences are highly probable and fully anticipated, such incitement cannot be defended as mere speech. It is conduct designed to breach the public peace, using the First Amendment as a shield. Citizens of Miami Beach have the right, even the duty, to protect themselves from that despi- cable design". This argument is dangerous. It is often heard, but it seriously mis- apprehends the concept of "incitement to riot". That a message or a symbol excites an audience to furious antagonism gives no evidence whatever of criminal incitement. That crime consists in urging upon one's audience the commission of some unlawful act in a context in which it is probable that some in the audience will do what is being urged. Even then the speaker will not normally be guilty of criminal incitement unless persons in his audience do in fact engage in the un- lawful conduct he urged upon them. Nothing like these conditions are present in the case of a Nazi march in Miami Beach, or an anti-Contra demonstration in Miami. In such demonstrations it is usual that no specific acts are urged at all, and Nazis are very careful never to urge illegal acts. They say things like: "Jews Not Wanted Here!" or, "White Power!" or, "America for the White Man!" Some in their audience may then break the law by attacking not the Jews but the Nazis themselves - but those whose symbols provoked their fury cannot be criminally responsible for that misconduct.

Incitement must be (and in the law it is) very narrowly delineated. When overt unlawful deeds are committed as a direct consequence of agitating speech, that speech becomes a part of the crime - as the planning of a robbery becomes part of the robbery itself and persons whose inflammatory words lead to the very disorder they propose may be similarly culpable as part of the deliberate creators of that disorder. But Nazis, in Miami Beach, where no one in the audience will be in- clined to do anything they may urge, could never be guilty of inciting to riot.

#### Fighting words doctrine does not prohibit hate speech

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But this argument simply does not apply to the case of the political demonstration here being discussed. First, the doctrine, that words may be treated as equivalent to the first blows in a fight is highly suspect, and it is a view now almost completely abandoned in the courts. What words under what circum- stances may be treated so must forever be uncertain and disputable. Words that infuriate you may merely amuse me. Words can hurt, surely, - but there is a great difference between verbal hurts and physical blows. That is why, honoring freedom generally, we place freedom of speech in the most protected of arenas. If words that sometimes provoke a fight are punished because of that danger, the un- certainty about which words may have that consequence must chill all debate, hedge all robust speaking in a vigorous contest. Words are not literal blows; the metaphor must not be allowed to confuse; the theory that, in a civil society, nasty words may justify physical retaliation is simply not tenable. But, second, even if the "fighting words" doctrine had some appro- priate application in some contexts, it would have to be so narrowly restricted to special circumstances as to have no bearing on a proposed demonstration by a political sect or party. It could, at best, be applied only to utterances by a specific person to the face of another, being defamatory in the extreme. Demonstrations before a general public - by the KKK, or the Black Panthers, or the anti-Contras, or the pro- Contras - are not one-to-one confrontations however maddening we may think their point. Third, the doctrine could apply, if ever, only after those personal insults had been hurled, and a retaliatory blow struck - never as the ground for forbidding a demonstration in advance. And finally, if the doctrine were ever applicable, it would certainly be restricted to cases of grave, personal offense; it has no application where the cause of agitation, however bitter, is political. This "fighting words" gambit cannot succeed.

#### Hate speech can not be prohited because it is obscene

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Even where the matter in question has no political content, and is sexually explicit, and is known to give offense to some, we protect the freedom of others to see or hear it by obliging those who are offended to shield themselves by turning it off, or turning away, or walking away. That was the very issue faced by the Supreme Court of the United States in another case - a Florida case, in fact [Erznoznick v. City ofJacksonvilIe, 422 US 205 at 207, 1975]. The objectionable matter in question appeared on a drive-in movie screen, showing X-rated films, and viewable from a road in the distance. But when it is possible for a viewer or hearer to turn away, said the Court, his being offended when he does not do so will not serve to cancel the rights of others to speak, or to listen or to watch. Justice Powell, recently retired from the Court, wrote the majority opinion in Erznoznick, saying, in part:. "When the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.... [R]estrictions have been upheld only when the speaker intrudes upon the privacy of the home ... or the degree of captivity [of the audience] makes it im- practical for the unwilling viewer or auditor to avoid exposure" (p. 209).

#### The rights of minorities to protest and engage in activism is contingent on the rights of individuals with views that we condemn

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And we cannot make exceptions for the specially nasty bits. Some say: "OK then, let them speak - but not with their infernal Swastika!" But if the Swastika is too offensive for some to tolerate today, the Star of David will be claimed equally intolerable by others tomorrow. So, I say, the Nazis have the same right to sing the "Hort Wessel Lied~, that others have to sing the "Internationale", and still others ~We Shall Overcome". To the claim that some stuff is just too nasty to permit, I answer: no degree of nastiness can justify silencing speech in a free society. Even on Miami Beach for the Nazis? And even in Miami for the anti-Contras? Yes, the effectiveness of political protest often depends critically upon the symbolic use of location. When the Nazis planned to demonstrate in Skokie ten years ago, whatever we may think of them, that location, being heavilyJewish, was part of their point. Civil rights demonstrators, as part of their point often carried their moral convictions, very offensive to the segregationist majority, to the heart of Jim Crow country -- to Selma, Alabama, and Philadelphia, Missis- sippi. Blacks who demonstrate for fair housing opportunities often do so in the heart of middle-class suburban communities that would ex- clude them. The Nazis carry signs reading "White Power". If we do not permit them to do that in black neighborhoods, how can we justify Black Panthers carrying signs saying "Black Power" in white neighbor- hoods? But the civil rights marchers carried a message of human equality and decency; the swastika is the symbol of unspeakable indecency. Yes. But that judgment of contents cannot be made antecedently, and can have no bearing upon the right to speak publicly. Our best hope that sound judgment will be passed upon nasty political views lies in the freedom of all to hear them, and the freedom of all to speak and write in reply. I conclude: We learn from the extreme case. The Nazis, by present- ing a case about as extreme as any we can conjure up, provide us with an instructive test of our own principles. These are powerful principles, and sound ones; they are a tribute to our own civility, and - if I may be permitted to end on a slightly corny note - one of the most deeply satisfying marks of our own national culture, of which I am very proud.

### Murdoch

#### Freedom is a progressive attempt to change our orientation towards the world around us, rather than an isolated act of the will

Murdoch 71, Iris. (Dame Jean Iris Murdoch DBE (/ˈmɜːrdɒk/; 15 July 1919 – 8 February 1999) was a British novelist and philosopher, best known for her novels about good and evil, sexual relationships, morality, and the power of the unconscious.) The Sovereignty of Good. Routledge. 1971. NP 1/31/17.

What M is ex hypothesi attempting to do is not just to see D accurately but to see her justly or lovingly. Notice the rather different image of freedom which this at once suggests. Freedom is not the sudden jumping of the isolated will in and out of an impersonal logical complex, it is a function of the progressive attempt to see a particular object clearly. M’s activity is essen- tially something progressive, something infinitely perfectible. So far from claiming for it a sort of infallibility, this new picture has built in the notion of a necessary fallibility. M is engaged in an endless task. As soon as we begin to use words such as ‘love’ and ‘justice’ in characterizing M, we introduce into our whole con- ceptual picture of her situation the idea of progress, that is the idea of perfection: and it is just the presence of this idea which demands an analysis of mental concepts which is different from the genetic one. I am now inclined to think that it is pointless, when faced with the existentialist-behaviourist picture of the mind, to go on endlessly fretting about the identification of particular inner events, and attempting to defend an account of M as ‘active’ by producing, as it were, a series of indubitably objective little things. ‘Not a report’ need not entail ‘not an activity’. But to elaborate this what is needed is some sort of change of key, some moving of the attack to a different front. Let us consider for a moment the apparently so plausible idea of identity as depend- ent upon observers and rules, an idea which leads on directly to the genetic analysis of mental concepts. This is really red if several people agree about the description, indeed this is what being really red means. He really decided, roughly, if people agree that he kept the rules of the concept ‘decide’. To decide means to keep these rules and the agent is not the only judge. Actions are ‘moving things about in the public world’, and what these movements are objective observers are actually and potentially at hand to decide.

#### Psychoanalysis fails – it presumes that philosophy relies on science which it doesn’t

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There is of course a ‘science’ which concerns itself especially with the history of the individual: psychoanalysis. And with a determination at all costs not to part company with a scientific conception of ‘the objective’ it is to psycho-analysis that Professor Hampshire finally appeals: he very properly lets in the historical individual, but hopes to keep him by this means upon a lead. Hampshire reads in an impersonal background to the individual’s checking procedure with the help of the notion of an ideal analysis. The analyst is pictured as somehow ‘there’, as the ultimate competent observer playing the part of the eye of God. Hampshire allows that it is possible in theory though not in practice to ‘approach complete explanations of inclination and behaviour in any individual case through an interminable analy- sis’. But why should some unspecified psychoanalyst be the measure of all things? Psychoanalysis is a muddled embryonic science, and even if it were not there is no argument that I know of that can show us that we have got to treat its concepts as fundamental. The notion of an ‘ideal analysis’ is a misleading one. There is no existing series the extension of which could lead to such an ideal. This is a moral question; and what is at stake here is the liberation of morality, and of philosophy as a study of human nature, from the domination of science: or rather from the domination of inexact ideas of science which haunt philo- sophers and other thinkers. Because of the lack until fairly recently of any clear distinction between science and philosophy this issue has never presented itself so vividly before. Philosophy in the past has played the game of science partly because it thought it was science.

#### Existentialism fails – it can not account for the independence of moral philosophy from science

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Existentialism, in both its Continental and its Anglo-Saxon versions, is an attempt to solve the problem without really facing it: to solve it by attributing to the individual an empty lonely freedom, a freedom, if he wishes, to ‘fly in the face of the facts’. What it pictures is indeed the fearful solitude of the individual marooned upon a tiny island in the middle of a sea of scientific facts, and morality escaping from science only by a wild leap of the will. But our situation is not like this. To put it simply and in terms of the example which we have considered of M and her daughter-in-law: even if M were given a full psychoanalytical explanation of her conduct to D she need not be confined by such an explanation. This is not just because M has a senseless petulant freedom which enables her to be blind, nor is it just because (the more subtle view favoured by Hampshire) she is then enabled to redeploy her psychic forces on a ground of greater knowledge. It is because M is not forced to adopt these concepts at all, in preference say to any particular set of moral or religious concepts. Science can instruct morality at certain points and can change its direction, but it cannot contain morality, nor ergo moral philosophy. The importance of this issue can more easily be ignored by a philosophy which divorces freedom and knowledge, and leaves knowledge (via an uncriticized idea of ‘impersonal reasons’) in the domain of science. But M’s independence of science and of the ‘world of facts’ which empiricist philosophy has created in the scientific image rests not simply in her moving will but in her seeing knowing mind. Moral concepts do not move about within a hard world set up by science and logic. They set up, for different purposes, a different world.

#### Abstract concepts are insufficient for ethics – rather, moral content is produced through experience and development of attitudes towards external objects

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The entry into a mental concept of the notion of an ideal limit destroys the genetic analysis of its meaning. (Hampshire allowed the idea of perfection to touch one concept only, that of intention: but he tried to save this concept from morality by making the ideal limit a scientific one.) Let us see how this is. Is ‘love’ a mental concept, and if so can it be analysed genetically? No doubt Mary’s little lamb loved Mary, that is it followed her to school; and in some sense of ‘learn’ we might well learn the concept, the word, in that context. But with such a concept that is not the end of the matter. (Nor indeed the beginning either.) Words may mislead us here since words are often stable while concepts alter; we have a different image of courage at forty from that which we had at twenty. A deepening process, at any rate an altering and complicating process, takes place. There are two senses of ‘knowing what a word means’, one connected with ordinary language and the other very much less so. Knowledge of a value concept is something to be understood, as it were, in depth, and not in terms of switching on to some given impersonal network. Moreover, if morality is essentially connected with change and progress, we cannot be as democratic about it as some philosophers would like to think. We do not simply, through being rational and knowing ordinary language, ‘know’ the meaning of all necessary moral words. We may have to learn the meaning; and since we are human historical indi- viduals the movement of understanding is onward into increas- ing privacy, in the direction of the ideal limit, and not back towards a genesis in the rulings of an impersonal public language.

#### Virtue can not just be copied

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In suggesting that the central concept of morality is ‘the indi- vidual’ thought of as knowable by love, thought of in the light of the command, ‘Be ye therefore perfect’, I am not, in spite of the philosophical backing which I might here resort to, suggesting anything in the least esoteric. In fact this would, to the ordinary person, be a very much more familiar image than the existential- ist one. We ordinarily conceive of and apprehend goodness in terms of virtues which belong to a continuous fabric of being. And it is just the historical, individual, nature of the virtues as actually exemplified which makes it difficult to learn goodness from another person. It is all very well to say that ‘to copy a right action is to act rightly’ (Hampshire, Logic and Appreciation), but what is the form which I am supposed to copy? It is a truism of recent philosophy that this operation of discerning the form is fairly easy, that rationality in this simple sense is a going con- cern. And of course for certain conventional purposes it is. But it is characteristic of morals that one cannot rest entirely at the conventional level, and that in some ways one ought not to.

#### Language informs the concepts we use to understand the world – problematic language can be corrupting

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Let me suggest in more detail how I think this process actually happens. This will I hope enable me to clarify the status of the view I hold and to relate it to linguistic philosophy in particular. I have spoken of a process of deepening or complicating, a pro- cess of learning, a progress, which may take place in moral concepts in the dimension which they possess in virtue of their relation to an ideal limit. In describing the example of M and her daughter-in-law I drew attention to the important part played by the normative-descriptive words, the specialized or secondary value words. (Such as ‘vulgar’, ‘spontaneous’, etc.) By means of these words there takes place what we might call ‘the siege of the individual by concepts’. Uses of such words are both instruments and symptoms of learning. Learning takes place when such words are used, either aloud or privately, in the context of particular acts of attention. (M attending to D.) This is a point to be emphasized. That words are not timeless, that word- utterances are historical occasions, has been noted by some philosophers for some purposes. (Strawson notes it when attack- ing the Theory of Descriptions.) But the full implications of this fact, with its consequences for the would-be timeless image of reason, have not, in our modern philosophy, been fully drawn. As Plato observes at the end of the Phaedrus, words themselves do not contain wisdom. Words said to particular individuals at par- ticular times may occasion wisdom. Words, moreover, have both spatio-temporal and conceptual contexts. We learn through attending to contexts, vocabulary develops through close attention to objects, and we can only understand others if we can to some extent share their contexts. (Often we cannot.) Uses of words by persons grouped round a common object is a central and vital human activity. The art critic can help us if we are in the presence of the same object and if we know something about his scheme of concepts. Both contexts are relevant to our ability to move towards ‘seeing more’, towards ‘seeing what he sees’. Here, as so often, an aesthetic analogy is helpful for morals. M could be helped by someone who both knew D and whose conceptual scheme M could understand or in that context begin to understand. Progress in understanding of a scheme of con- cepts often takes place as we listen to normative-descriptive talk in the presence of a common object. I have been speaking, in relation to our example, of progress or change for the better, but of course such change (and this is more commonly to be observed) may also be for the worse. Everyday conversation is not necessarily a morally neutral activity and certain ways of describing people can be corrupting and wrong. A smart set of concepts may be a most efficient instrument of corruption. It is especially characteristic of normative words, both desirable and undesirable, to belong to sets or patterns without an appreci- ation of which they cannot be understood. If a critic tells us that a picture has ‘functional colour’ or ‘significant form’ we need to know not only the picture but also something about his general theory in order to understand the remark. Similarly, if M says D is ‘common’, although the term does not belong to a technical vocabulary, this use of it can only be fully understood if we know not only D but M.

#### Language forms our fabric of knowledge

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Words are the most subtle symbols which we possess and our human fabric depends on them. The living and radical nature of language is something which we forget at our peril. It is totally misleading to speak, for instance, of ‘two cultures’, one literary- humane and the other scientific, as if these were of equal status. There is only one culture, of which science, so interesting and so dangerous, is now an important part. But the most essential and fundamental aspect of culture is the study of literature, since this is an education in how to picture and understand human situ- ations. We are men and we are moral agents before we are scien- tists, and the place of science in human life must be discussed in words. This is why it is and always will be more important to know about Shakespeare than to know about any scientist: and if there is a ‘Shakespeare of science’ his name is Aristotle.

#### The notion of freedom as occurring as an isolated choice is empty in characterizing freedom as only an outward action – exercise of freedom is instead cultivated over time through our building of a worldview that influence the way that we approach decisionmaking. Only this can reconcile Kantian and deterministic views.

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Let us now ask quite simply if this is realistic, if this is what, in our experience, moral choice is like. It might seem at first that the existentialists have an advantage in that they do account for a peculiar feature of moral choice, which is the strange emptiness which often occurs at the moment of choosing. Of course choices happen at various levels of consciousness, importance, and difficulty. In a simple easy unimportant choice there is no need to regard ‘what goes on’ as anything beyond the obvious sequence of reason, decision, action, or just reason, action; and such choices may properly be regarded as ‘impersonal’. ‘Shall I go? Oh yes, I promised to.’ I receive my bill and I pay it. But difficult and painful choices often present this experience of void of which so much has been made: this sense of not being determined by the reasons. This sensation is hailed with delight by both wings of existentialism. The Kantian wing claims it as showing that we are free in relation to the reasons and the Sur- realist wing claims it as showing that there are no reasons. Indeed this experience of emptiness seems perfectly to verify the notion that freedom is simply the movement of the lonely will. Choice is outward movement since there is nothing else there for it to be. But is this the case, and ought we really to be so pleased about this experience? A more sombre note concerning it is struck at one point by Sartre, who on this problem veers wildly between Kantianism and Surrealism. Quand je délibère les jeux sont faits. If we are so strangely separate from the world at moments of choice are we really choosing at all, are we right indeed to identify ourselves with this giddy empty will? (Hampshire: ‘I identify myself with my will.’) In a reaction of thought which is never far from the minds of more extreme existentialists (Dostoevsky for instance), one may turn here towards determinism, towards fatalism, towards regarding freedom as a complete illusion. When I deliberate the die is already cast. Forces within me which are dark to me have already made the decision. This view is if anything less attractive and less realistic than the other one. Do we really have to choose between an image of total freedom and an image of total determinism? Can we not give a more balanced and illuminating account of the matter? I suggest we can if we simply introduce into the picture the idea of atten- tion, or looking, of which I was speaking above. I can only choose within the world I can see, in the moral sense of ‘see’ which implies that clear vision is a result of moral imagination and moral effort. There is also of course ‘distorted vision’, and the word ‘reality’ here inevitably appears as a normative word. When M is just and loving she sees D as she really is. One is often compelled almost automatically by what one can see. If we ignore the prior work of attention and notice only the emptiness of the moment of choice we are likely to identify freedom with the outward movement since there is nothing else to identify it with. But if we consider what the work of attention is like, how continuously it goes on, and how imperceptibly it builds up structures of value round about us, we shall not be surprised that at crucial moments of choice most of the business of choosing is already over. This does not imply that we are not free, certainly not. But it implies that the exercise of our freedom is a small piecemeal business which goes on all the time and not a grandi- ose leaping about unimpeded at important moments. The moral life, on this view, is something that goes on continually, not something that is switched off in between the occurrence of explicit moral choices. What happens in between such choices is indeed what is crucial. I would like on the whole to use the word ‘attention’ as a good word and use some more general term like ‘looking’ as the neutral word. Of course psychic energy flows, and more readily flows, into building up convincingly coherent but false pictures of the world, complete with systematic vocabu- lary. (M seeing D as pert-common-juvenile, etc.) Attention is the effort to counteract such states of illusion.

#### Goodness is constituted through moral knowledge and appropriate orientation towards the external world//a2 naturalistic fallacy

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On this view we are certainly in a sense less free than we are pictured as being on the other view, in that the latter presents a condition of perfect freedom as being either our unavoidable fate (the Surrealists) or our conceivably attainable goal (the Kan- tians). Freedom for Hampshire is a matter of having crystal-clear intentions. But on the view which I suggest, which connects morality with attention to individuals, human individuals or individual realities of other kinds, the struggle and the progress is something more obscure, more historically conditioned, and usually less clearly conscious. Freedom, itself a moral concept and not just a prerequisite of morality, cannot here be separated from the idea of knowledge. That of which it is knowledge, that ‘reality’ which we are so naturally led to think of as revealed by just ‘attention’, can of course, given the variety of human personality and situation, only be thought of as ‘one’, as a single object for all men, in some very remote and ideal sense. It is a deep paradox of moral philosophy that almost all philosophers have been led in one way or another to picture goodness as knowledge: and yet to show this in any sort of detail, to show ‘reality’ as ‘one’, seems to involve an improper prejudging of some moral issue. An acute consciousness of this latter difficulty has indeed made it seem axiomatic to recent philosophers that ‘naturalism is a fallacy’. But I would suggest that at the level of serious common sense and of an ordinary non-philosophical reflection about the nature of morals it is perfectly obvious that goodness is connected with knowledge: not with impersonal quasi-scientific knowledge of the ordinary world, whatever that may be, but with a refined and honest perception of what is really the case, a patient and just discernment and exploration of what confronts one, which is the result not simply of opening one’s eyes but of a certainly perfectly familiar kind of moral discipline.

#### Will and reason can not be independent of belief

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Will and reason then are not entirely separate faculties in the moral agent. Will continually influences belief; for better or worse, and is ideally able to influence it through a sustained attention to reality. This is what Simone Weil means when she says that ‘will is obedience not resolution’. As moral agents we have to try to see justly, to overcome prejudice, to avoid tempta- tion, to control and curb imagination, to direct reflection. [one] Man is not a combination of an impersonal rational thinker and a per- sonal will. He is a unified being who sees, and who desires in accordance with what [s]he sees, and who has some continual slight control over the direction and focus of his vision. There is nothing, I think, in the foreground of this picture which is unfamiliar to the ordinary person. Philosophical difficulties may arise if we try to give any single organized background sense to the normative word ‘reality’. But this word may be used as a philosophical term provided its limitations are understood. What is real may be ‘non-empirical’ without being in the grand sense systematic. In particular situations ‘reality’ as that which is revealed to the patient eye of love is an idea entirely comprehen- sible to the ordinary person. M knows what she is doing when she tries to be just to D, and we know what she is doing too.

#### Only an Augustinian/platonic approach to ethics can account for the value of art. Existentialism can provide no coherent understanding

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I said that any artist would appreciate the notion of ill as obedience to reality, an obedience which ideally teaches a pos- ition where there is no choice. One of the great merits of the moral psychology which I am proposing is that it does not contrast art and morals, but shows them to be two aspects of a single struggle. The existentialist-behaviourist view could give no satisfactory account of art: it was seen as a quasi-play activity, gratuitous, ‘for its own sake’ (the familiar Kantian-Bloomsbury slogan), a sort of by-product of our failure to be entirely rational. Such a view of art is of course intolerable. In one of those important movements of return from philosophical theory to simple things which we are certain of, we must come back to what we know about great art and about the moral insight which it contains and the moral achievement which it repre- sents. Goodness and beauty are not to be contrasted, but are largely part of the same structure. Plato, who tells us that beauty is the only spiritual thing which we love immediately by nature, treats the beautiful as an introductory section of the good. So that aesthetic situations are not so much analogies of morals as cases of morals. Virtue is au fond the same in the artist as in the good man in that it is a selfless attention to nature: something which is easy to name but very hard to achieve. Artists who have reflected have frequently given expression to this idea. (For instance, Rilke praising Cézanne speaks of a ‘consuming of love in anonymous work’. Letter to Clara Rilke, 13 October 1907.)

#### The existential view is empty and can not account for the moral importance of the real

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Since the existentialist-behaviourist view wished to conceive of will as pure movement separated from reason and to deprive reason of the use of normative words (since it was to be ‘object- ive’), the moral agent so envisaged could get along, was indeed almost forced to get along, with only the most empty and gen- eral moral terms such as ‘good’ and ‘right’. The empty moral words correspond here to the emptiness of the will. If the will is to be totally free the world it moves in must be devoid of norma- tive characteristics, so that morality can reside entirely in the pointer of pure choice. On my view it might be said that, per contra, the primary general words could be dispensed with entirely and all moral work could be done by the secondary specialized words. If we picture the agent as compelled by obedience to the reality he can see, he will not be saying ‘This is right’, i.e., ‘I choose to do this’, [s]he will be saying ‘This is A B C D’ (normative-descriptive words), and action will follow natur- ally. As the empty choice will not occur the empty word will not be needed. It would however be far from my intention to demote or dispense with the term ‘good’: but rather to restore to it the dignity and authority which it possessed before Moore ap- peared on the scene. I have spoken of efforts of attention direc- ted upon individuals and of obedience to reality as an exercise of love, and have suggested that ‘reality’ and ‘individual’ present themselves to us in moral contexts as ideal end-points or Ideas of Reason. This surely is the place where the concept of good lives. ‘Good’: ‘Real’: ‘Love’. These words are closely connected. And here we retrieve the deep sense of the indefinability of good, which has been given a trivial sense in recent philosophy. Good is indefinable not for the reasons offered by Moore’s successors, but because of the infinite difficulty of the task of apprehending a magnetic but inexhaustible reality. Moore was in a way nearer the truth than he realized when he tried to say both that Good was there and that one could say nothing of what it essentially was. If apprehension of good is apprehension of the individual and the real, then good partakes of the infinite elusive character of reality.

#### Existentialism presents an unrealistic and inaccurate account of human identity by attributing the will to instantaneous moments of choice

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We have learned from Freud to picture ‘the mechanism’ as something highly individual and personal, which is at the same time very powerful and not easily understood by its owner. The self of psychoanalysis is certainly substantial enough. The existentialist picture of choice, whether it be surrealist or rational, seems unrealistic, over-optimistic, romantic, because it ignores what appears at least to be a sort of continuous background with a life of its own; and it is surely in the tissue of that life that the secrets of good and evil are to be found. Here neither the inspir- ing ideas of freedom, sincerity and fiats of will, nor the plain wholesome concept of a rational discernment of duty, seem complex enough to do justice to what we really are. What we really are seems much more like an obscure system of energy out of which choices and visible acts of will emerge at intervals in ways which are often unclear and often dependent on the condition of the system in between the moments of choice.

#### The Kantian notion of choice is ill-suited to describe our ability to make moral decisions

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Let us take first the notion of an object of attention. The religious believer, especially if his God is conceived of as a per- son, is in the fortunate position of being able to focus his thought upon something which is a source of energy. Such focusing, with such results, is natural to human beings. Consider being in love. Consider too the attempt to check being in love, and the need in such a case of another object to attend to. Where strong emotions of sexual love, or of hatred, resentment, or jealousy are concerned, ‘pure will’ can usually achieve little. It is small use telling oneself ‘Stop being in love, stop feeling resent- ment, be just.’ What is needed is a reorientation which will provide an energy of a different kind, from a different source. Notice the metaphors of orientation and of looking. The neo- Kantian existentialist ‘will’ is a principle of pure movement. But how ill this describes what it is like for us to alter. Deliberately falling out of love is not a jump of the will, it is the acquiring of new objects of attention and thus of new energies as a result of refocusing. The metaphor of orientation may indeed also cover moments when recognizable ‘efforts of will’ are made, but explicit efforts of will are only a part of the whole situation. That God, attended to, is a powerful source of (often good) energy is a psychological fact. It is also a psychological fact, and one of Downloaded by [Florida State University] at 09:12 28 January 2017 importance in moral philosophy, that we can all receive moral help by focusing our attention upon things which are valuable: virtuous people, great art, perhaps (I will discuss this later) the idea of goodness itself. Human beings are naturally ‘attached’ and when an attachment seems painful or bad it is most readily displaced by another attachment, which an attempt at attention can encourage. There is nothing odd or mystical about this, nor about the fact that our ability to act well ‘when the time comes’ depends partly, perhaps largely, upon the quality of our habitual objects of attention. ‘Whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things of good report; if there be any virtue, and if there be any praise, think on these things.’

It is difficult to be exact here. One might start from the asser- tion that morality, goodness, is a form of realism. The idea of a really good man living in a private dream world seems unaccept- able. Of course a good man may be infinitely eccentric, but he must know certain things about his surroundings, most obvi- ously the existence of other people and their claims. The chief enemy of excellence in morality (and also in art) is personal fantasy: the tissue of self-aggrandizing and consoling wishes and dreams which prevents one from seeing what is there outside one. Rilke said of Cézanne that he did not paint ‘I like it’, he painted ‘There it is.’ This is not easy, and requires, in art or morals, a discipline. One might say here that art is an excellent analogy of morals, or indeed that it is in this respect a case of morals. We cease to be in order to attend to the existence of something else, a natural object, a person in need. We can see in mediocre art, where perhaps it is even more clearly seen than in mediocre conduct, the intrusion of fantasy, the assertion of self, the dimming of any reflection of the real world.

#### Interesting

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It may be agreed that the direction of attention should properly be outward, away from self, but it will be said that it is a long step from the idea of realism to the idea of transcendence. I think, however, that these two ideas are related, and one can see their relation particularly in the case of our apprehension of beauty. The link here is the concept of indestructibility or incorruptibility. What is truly beautiful is ‘inaccessible’ and cannot be possessed or destroyed. The statue is broken, the flower fades, the experience ceases, but something has not suffered from decay and mortality. Almost anything that consoles us is a fake, and it is not easy to prevent this idea from degenerating into a vague Shelleyan mysticism. In the case of the idea of a transcendent personal God the degeneration of the idea seems scarcely avoidable: theologians are busy at their desks at this very moment trying to undo the results of this degeneration. In the case of beauty, whether in art or in nature, the sense of separate- ness from the temporal process is connected perhaps with concepts of perfection of form and ‘authority’ which are not easy to transfer into the field of morals. Here I am not sure if this is an analogy or an instance. It is as if we can see beauty itself in a way in which we cannot see goodness itself. (Plato says this at Phaedrus 250e.) I can experience the transcendence of the beautiful, but (I think) not the transcendence of the good. Beautiful things con- tain beauty in a way in which good acts do not exactly contain good, because beauty is partly a matter of the senses. So if we speak of good as transcendent we are speaking of something rather more complicated and which cannot be experienced, even when we see the unselfish man in the concentration camp. One might be tempted to use the word ‘faith’ here if it could be purged of its religious associations. ‘What is truly good is incor- ruptible and indestructible.’ ‘Goodness is not in this world.’ These sound like highly metaphysical statements. Can we give them any clear meaning or are they just things one ‘feels inclined to say’?

#### Only ideals can truly motivate us to be better

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Let us consider the case of conduct. What of the command ‘Be ye therefore perfect?’ Would it not be more sensible to say ‘Be ye therefore slightly improved?’ Some psychologists warn us that if our standards are too high we shall become neurotic. It seems to me that the idea of love arises necessarily in this context. The idea of perfection moves, and possibly changes, us (as artist, worker, agent) because it inspires love in the part of us that is most worthy. One cannot feel unmixed love for a mediocre moral standard any more than one can for the work of a mediocre artist. The idea of perfection is also a natural producer of order. In its light we come to see that A, which superficially resembles B, is really better than B. And this can occur, indeed must occur, without our having the sovereign idea in any sense ‘taped’. In fact it is in its nature that we cannot get it taped. This is the true sense of the ‘indefinability’ of the good; which was given a vulgar sense by Moore and his followers. It lies always beyond, and it is from this beyond that it exercises its authority. Here again the word seems naturally in place, and it is in the work of artists that we see the operation most clearly. The true artist is obedient to a conception of perfection to which his work is constantly related and re-related in what seems an external manner. One may of course try to ‘incarnate’ the idea of perfec- tion by saying to oneself ‘I want to write like Shakespeare’ or ‘I want to paint like Piero’. But of course one knows that Shake- speare and Piero, though almost gods, are not gods, and that one has got to do the thing oneself alone and differently, and that beyond the details of craft and criticism there is only the mag- netic non-representable idea of the good which remains not ‘empty’ so much as mysterious. And thus too in the sphere of human conduct.

#### The good requires an orientation of love towards the world around us

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It is important too that great art teaches us how real things can be looked at and loved without being seized and used, without being appropriated into the greedy organism of the self. This exercise of detachment is difficult and valuable whether the thing contemplated is a human being or the root of a tree or the vibration of a colour or a sound. Unsentimental contemplation of nature exhibits the same quality of detachment: selfish con- cerns vanish, nothing exists except the things which are seen. Beauty is that which attracts this particular sort of unselfish attention. It is obvious here what is the role, for the artist or spectator, of exactness and good vision: unsentimental, detached, unselfish, objective attention. It is also clear that in moral situations a similar exactness is called for. I would suggest that the authority of the Good seems to us something necessary because the realism (ability to perceive reality) required for goodness is a kind of intellectual ability to perceive what is true, which is automatically at the same time a suppression of self. The necessity of the good is then an aspect of the kind of necessity involved in any technique for exhibiting fact. In thus treating realism, whether of artist or of agent, as a moral achievement, there is of course a further assumption to be made in the fields of morals: that true vision occasions right conduct. This could be uttered simply as an enlightening tautology: but I think it can in fact be supported by appeals to experience. The more the separateness and different- ness of other people is realized, and the fact seen that another man has needs and wishes as demanding as one’s own, the harder it becomes to treat a person as a thing. That it is realism which makes great art great remains too as a kind of proof. If, still led by the clue of art, we ask further questions about the faculty which is supposed to relate us to what is real and thus bring us to what is good, the idea of compassion or love will be naturally suggested. It is not simply that suppression of self is required before accurate vision can be obtained. The great artist sees his objects (and this is true whether they are sad, absurd, repulsive or even evil) in a light of justice and mercy. The direc- tion of attention is, contrary to nature, outward, away from self which reduces all to a false unity, towards the great surprising variety of the world, and the ability so to direct attention is love.

#### Only an understanding of human identity that accounts for our orientation to the world around us can provide a coherent notion of freedom and ethical action

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One might at this point pause and consider the picture of human personality, or the soul, which has been emerging. It is in the capacity to love, that is to see, that the liberation of the soul from fantasy consists. The freedom which is a proper human goal is the freedom from fantasy, that is the realism of compassion. What I have called fantasy, the proliferation of blinding self-centred aims and images, is itself a powerful system of energy, and most of what is often called ‘will’ or ‘willing’ belongs to this system. What counteracts the system is attention to reality inspired by, consisting of, love. In the case of art and nature such attention is immediately rewarded by the enjoyment of beauty. In the case of morality, although there are sometimes rewards, the idea of a reward is out of place. Freedom is not strictly the exercise of the will, but rather the experience of accurate vision which, when this becomes appropriate, occasions action. It is what lies behind and in between actions and prompts them that is important, and it is this area which should be purified. By the time the moment of choice has arrived the quality of attention has probably determined the nature of the act. This fact produces that curious separation between consciously rehearsed motives and action which is sometimes wrongly taken as an experience of freedom. (Angst.) Of course this is not to say that good ‘efforts of will’ are always useless or always fakes. Explicit and immediate ‘willing’ can play some part, especially as an inhibiting factor. (The daemon of Socrates only told him what not to do.)

#### Self-reflection can not be the basis of an ethical theory -- we can not accurately perceive ourselves, nor can self-reflection be the basis of bettering ourselves

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In such a picture sincerity and self-knowledge, those popular merits, seem less important. It is an attachment to what lies outside the fantasy mechanism, and not a scrutiny of the mech- anism itself, that liberates. Close scrutiny of the mechanism often merely strengthens its power. ‘Self-knowledge’, in the sense of a minute understanding of one’s own machinery, seems to me, except at a fairly simple level, usually a delusion. A sense of such self-knowledge may of course be induced in analysis for thera- peutic reasons, but ‘the cure’ does not prove the alleged know- ledge genuine. Self is as hard to see justly as other things, and when clear vision has been achieved, self is a correspondingly smaller and less interesting object. A chief enemy to such clarity of vision, whether in art or morals, is the system to which the technical name of sado-masochism has been given. It is the peculiar subtlety of this system that, while constantly leading attention and energy back into the self, it can produce, almost all the way as it were to the summit, plausible imitations of what is good. Refined sado-masochism can ruin art which is too good to be ruined by the cruder vulgarities of self-indulgence. One’s self is interesting, so one’s motives are interesting, and the unworthiness of one’s motives is interesting. Fascinating too is the alleged relation of master to slave, of the good self to the bad self which, oddly enough, ends in such curious compromises. (Kafka’s struggle with the devil which ends up in bed.) The bad self is prepared to suffer but not to obey until the two selves are friends and obedience has become reasonably easy or at least amusing. In reality the good self is very small indeed, and most of what appears good is not. The truly good is not a friendly tyrant to the bad, it is its deadly foe. Even suffering itself can play a demonic role here, and the ideas of guilt and punishment can be the most subtle tool of the ingenious self. The idea of suffer- ing confuses the mind and in certain contexts (the context of ‘sincere self-examination’ for instance) can masquerade as a purification. It is rarely this, for unless it is very intense indeed it is far too interesting. Plato does not say that philosophy is the Downloaded by [Florida State University] at 09:12 28 January 2017 study of suffering, he says it is the study of death (Phaedo 64a), and these ideas are totally dissimilar. That moral improvement involves suffering is usually true; but the suffering is the by- product of a new orientation and not in any sense an end in itself.

#### The Good, rather than the will is transcendent.

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It is here that it seems to me to be important to retain the idea of Good as a central point of reflection, and here too we may see the significance of its indefinable and non-representable charac- ter. Good, not will is transcendent. Will is the natural energy of the psyche which is sometimes employable for a worthy purpose. Good is the focus of attention when an intent to be virtuous co- exists (as perhaps it almost always does) with some unclarity of vision. Here, as I have said earlier, beauty appears as the visible and accessible aspect of the Good. The Good itself is not visible. Plato pictured the good man as eventually able to look at the sun. I have never been sure what to make of this part of the myth. While it seems proper to represent the Good as a centre or focus of attention, yet it cannot quite be thought of as a ‘visible’ one in that it cannot be experienced or represented or defined. We can certainly know more or less where the sun is; it is not so easy to imagine what it would be like to look at it. Perhaps indeed only the good man knows what this is like; or perhaps to look at the sun is to be gloriously dazzled and to see nothing. What does seem to make perfect sense in the Platonic myth is the idea of the Good as the source of light which reveals to us all things as they really are. All just vision, even in the strictest problems of the intellect, and a fortiori when suffering or wickedness have to be perceived, is a moral matter. The same virtues, in the end the same virtue (love), are required throughout, and fantasy (self ) can prevent us from seeing a blade of grass just as it can prevent us from seeing another person. An increasing awareness of ‘goods’ and the attempt (usually only partially successful) to attend to them purely, without self, brings with it an increasing awareness of the unity and interdependence of the moral world. One-seeking intelligence is the image of ‘faith’. Consider what it is like to increase one’s understanding of a great work of art.

#### An action can not separate itself from the background on which it is taken – our orientations to the world must be morally important

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I think it is more than a verbal point to say that what should be aimed at is goodness, and not freedom or right action, although right action, and freedom in the sense of humility, are the nat- ural products of attention to the Good. Of course right action is important in itself, with an importance which is not difficult to understand. But it should provide the starting-point of reflection and not its conclusion. Right action, together with the steady extension of the area of strict obligation, is a proper criterion of virtue. Action also tends to confirm, for better or worse, the background of attachment from which it issues. Action is an occasion for grace, or for its opposite. However, the aim of mor- ality cannot be simply action. Without some more positive conception of the soul as a substantial and continually developing mechanism of attachments, the purification and reorientation of which must be the task of morals, ‘freedom’ is readily corrupted into self-assertion and ‘right action’ into some sort of ad hoc utilitarianism. If a scientifically minded empiricism is not to swallow up the study of ethics completely, philosophers must try to invent a terminology which shows how our natural psychology can be altered by conceptions which lie beyond its range. It seems to me that the Platonic metaphor of the idea of the Good provides a suitable picture here. With this picture must of course be joined a realistic conception of natural psychology (about which almost all philosophers seem to me to have been too optimistic) and also an acceptance of the utter lack of finality in human life. The Good has nothing to do with purpose, indeed it excludes the idea of purpose. ‘All is vanity’ is the beginning and the end of ethics. The only genuine way to be good is to be good ‘for nothing’ in the midst of a scene where every ‘natural’ thing, including one’s own mind, is subject to chance, that is, to necessity. That ‘for nothing’ is indeed the experienced correlate Downloaded by [Florida State University] at 09:12 28 January 2017 70 the sovereignty of good of the invisibility or non-representable blankness of the idea of Good itself.

#### Metaphors are important in philosophy

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The development of consciousness in human beings is insepar- ably connected with the use of metaphor. Metaphors are not merely peripheral decorations or even useful models, they are fundamental forms of our awareness of our condition: meta- phors of space, metaphors of movement, metaphors of vision. Philosophy in general, and moral philosophy in particular, has in the past often concerned itself with what it took to be our most important images, clarifying existing ones and developing new ones. Philosophical argument which consists of such image-play, I mean the great metaphysical systems, is usually inconclusive, and is regarded by many contemporary thinkers as valueless. The status and merit of this type of argument raises, of course, many problems. However, it seems to me impossible to discuss certain kinds of concepts without resort to metaphor, since the concepts are themselves deeply metaphorical and can- not be analysed into non-metaphorical components without a loss of substance. Modern behaviouristic philosophy attempts such an analysis in the case of certain moral concepts, it seems to me without success. One of the motives of the attempt is a wish to ‘neutralize’ moral philosophy, to produce a philosophical dis- cussion of morality which does not take sides. Metaphors often carry a moral charge, which analysis in simpler and plainer terms is designed to remove. This too seems to me to be mis- guided. Moral philosophy cannot avoid taking sides, and would- be neutral philosophers merely take sides surreptitiously. Moral philosophy is the examination of the most important of all human activities, and I think that two things are required of it. The examination should be realistic. Human nature, as opposed to the natures of other hypothetical spiritual beings, has certain discoverable attributes, and these should be suitably considered in any discussion of morality. Secondly, since an ethical system cannot but commend an ideal, it should commend a worthy ideal. Ethics should not be merely an analysis of ordinary medi- ocre conduct, it should be a hypothesis about good conduct and about how this can be achieved. How can we make ourselves better? is a question moral philosophers should attempt to answer. And if I am right the answer will come partly at least in the form of explanatory and persuasive metaphors. The meta- phors which I myself favour and the philosopher under whose banner I am fighting I will make clear shortly.

#### What matters is the ability to perceive what is real and respond accordingly

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Herein we find a remarkable redemption of our tendency to conceal death and chance by the invention of forms. Any story which we tell about ourselves consoles us since it imposes pat- tern upon something which might otherwise seem intolerably chancy and incomplete. However, human life is chancy and incomplete. It is the role of tragedy, and also of comedy, and of painting to show us suffering without a thrill and death without a consolation. Or if there is any consolation it is the austere consolation of a beauty which teaches that nothing in life is of any value except the attempt to be virtuous. Masochism is the artist’s greatest and most subtle enemy. It is not easy to portray death, real death, not fake prettified death. Even Tolstoy did not really manage it in Ivan Ilyich, although he did elsewhere. The great deaths of literature are few, but they show us with an exemplary clarity the way in which art invigorates us by a juxta- position, almost an identification, of pointlessness and value. The death of Patroclus, the death of Cordelia, the death of Petya Rostov. All is vanity. The only thing which is of real importance is the ability to see it all clearly and respond to it justly which is inseparable from virtue. Perhaps one of the greatest achieve- ments of all is to join this sense of absolute mortality not to the tragic but to the comic. Shallow and Silence. Stefan Trofimovich Verhovensky.

#### A moral philosophy that exalts the value of freedom without accounting for the importance of moral love is doomed to fail

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That virtue operates in exactly the same kind of way in the central area of morality is less easy to perceive. Human beings are far more complicated and enigmatic and ambiguous than languages or mathematical concepts, and selfishness operates in Downloaded by [Florida State University] at 09:12 28 January 2017 the sovereignty of good over other concepts 89 a much more devious and frenzied manner in our relations with them. Ignorance, muddle, fear, wishful thinking, lack of tests often make us feel that moral choice is something arbitrary, a matter for personal will rather than for attentive study. Our attachments tend to be selfish and strong, and the transformation of our loves from selfishness to unselfishness is sometimes hard even to conceive of. Yet is the situation really so different? Should a retarded child be kept at home or sent to an institution? Should an elderly relation who is a trouble-maker be cared for or asked to go away? Should an unhappy marriage be continued for the sake of the children? Should I leave my family in order to do political work? Should I neglect them in order to practise my art? The love which brings the right answer is an exercise of justice and realism and really looking. The difficulty is to keep the atten- tion fixed upon the real situation and to prevent it from return- ing surreptitiously to the self with consolations of self-pity, resentment, fantasy and despair. The refusal to attend may even induce a fictitious sense of freedom: I may as well toss a coin. Of course virtue is good habit and dutiful action. But the back- ground condition of such habit and such action, in human beings, is a just mode of vision and a good quality of conscious- ness. It is a task to come to see the world as it is. A philosophy which leaves duty without a context and exalts the idea of free- dom and power as a separate top level value ignores this task and obscures the relation between virtue and reality. We act rightly ‘when the time comes’ not out of strength of will but out of the quality of our usual attachments and with the kind of energy and discernment which we have available. And to this the whole activity of our consciousness is relevant.

#### Claiming that we can not understand or find the good represents a corruption of philosophy

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Good has often been said to be indefinable for reasons con- nected with freedom. Good is an empty space into which human choice may move. I want now to suggest that the inde- finability of the good should be conceived of rather differently. On the kind of view which I have been offering it seems that we do really know a certain amount about Good and about the way in which it is connected with our condition. The ordinary per- son does not, unless corrupted by philosophy, believe that [s]he creates values by his choices. [s]He thinks that some things really are better than others and that he is capable of getting it wrong. We are not usually in doubt about the direction in which Good lies. Equally we recognize the real existence of evil: cynicism, cruelty, indifference to suffering. However, the concept of Good still remains obscure and mysterious. **We see the world in the light of the Good**, but what is the Good itself? The source of vision is not in the ordinary sense seen. Plato says of it ‘It is that which every soul pursues and for the sake of which it does all that it does, with some intuition of its nature, and yet also baffled’ (Republic 505). And he also says that Good is the source of knowledge and truth and yet is something which surpasses them in splendour (Republic 508–9).

#### A2 Love K//love is not an inherent good – it can be oriented towards the wrong ends.

Murdoch 71, Iris. (Dame Jean Iris Murdoch DBE (/ˈmɜːrdɒk/; 15 July 1919 – 8 February 1999) was a British novelist and philosopher, best known for her novels about good and evil, sexual relationships, morality, and the power of the unconscious.) The Sovereignty of Good. Routledge. 1971. NP 1/31/17.

However I think that Good and Love should not be identified, and not only because human love is usually self-assertive. The concepts, even when the idea of love is purified, still play differ- ent roles. We are dealing here with very difficult metaphors. Good is the magnetic centre towards which love naturally moves. False love moves to false good. False love embraces false death. When true good is loved, even impurely or by accident, the quality of the love is automatically refined, and when the soul is turned towards Good the highest part of the soul is enlivened. Love is the tension between the imperfect soul and the magnetic perfection which is conceived of as lying beyond it. (In the Symposium Plato pictures Love as being poor and needy.) And when we try perfectly to love what is imperfect our love goes to its object via the Good to be thus purified and made unselfish and just. The mother loving the retarded child or loving the tiresome elderly relation. Love is the general name of the quality of attachment and it is capable of infinite degradation and is the source of our greatest errors; but when it is even partially refined it is the energy and passion of the soul in its search for Good, the force that joins us to Good and joins us to the world through Good. Its existence is the unmistakable sign that we are spiritual creatures, attracted by excellence and made for the Good. It is a reflection of the warmth and light of the sun.

#### Could this be useful??

Murdoch 71, Iris. (Dame Jean Iris Murdoch DBE (/ˈmɜːrdɒk/; 15 July 1919 – 8 February 1999) was a British novelist and philosopher, best known for her novels about good and evil, sexual relationships, morality, and the power of the unconscious.) The Sovereignty of Good. Routledge. 1971. NP 1/31/17.

Perhaps the finding of other names for Good or the establish- ing of special relationships cannot be more than a sort of per- sonal game. However I want in conclusion to make just one more move. Goodness is connected with the acceptance of real death and real chance and real transience and only against the background of this acceptance, which is psychologically so dif- ficult, can we understand the full extent of what virtue is like. The acceptance of death is an acceptance of our own nothing- ness which is an automatic spur to our concern with what is not ourselves. The good man is humble; he is very unlike the big neo-Kantian Lucifer. He is much more like Kierkegaard’s tax Downloaded by [Florida State University] at 09:12 28 January 2017 the sovereignty of good over other concepts 101 collector. Humility is a rare virtue and an unfashionable one and one which is often hard to discern. Only rarely does one meet somebody in whom it positively shines, in whom one appre- hends with amazement the absence of the anxious avaricious tentacles of the self. In fact any other name for Good must be a partial name; but names of virtues suggest directions of thought, and this direction seems to me a better one than that suggested by more popular concepts such as freedom and courage. The humble man, because he sees himself as nothing, can see other things as they are. He sees the pointlessness of virtue and its unique value and the endless extent of its demand. Simone Weil tells us that the exposure of the soul to God condemns the selfish part of it not to suffering but to death. The humble man per- ceives the distance between suffering and death. And although he is not by definition the good man perhaps he is the kind of man who is most likely of all to become good.

### Lewis

#### The responsibility of educators is to cultivate in students the appropriate emotional responses to the external world

Lewis 1 [British novelist, poet, academic, medievalist, literary critic, essayist, lay theologian, and Christian apologist, employed at both Oxford and Cambridge] “the Abolition of Man” 1943. <http://www.columbia.edu/cu/augustine/arch/lewis/abolition2.htm> NP 2/6/17

From this passage the [student]schoolboy will learn about literature precisely nothing. What he will learn quickly enough, and perhaps indelibly, is the belief that all emotions aroused by local association are in themselves contrary to reason and contemptible. He will have no notion that there are two ways of being immune to such an advertisement—that it falls equally flat on those who are above it and those who are below it, on the man of real sensibility and on the mere trousered ape who has never been able to conceive the Atlantic as anything more than so many million tons of cold salt water. There are two men to whom we offer in vain a false leading article on patriotism and honour: one is the coward, the other is the honourable and patriotic man. None of this is brought before the schoolboy's mind. On the contrary, he is encouraged to reject the lure of the 'Western Ocean' on the very dangerous ground that in so doing he will prove himself a knowing fellow who can't be bubbled out of his cash. Gaius and Titius, while teaching him nothing about letters, have cut out of his soul, long before [s]he is old enough to choose, the possibility of having certain experiences which thinkers of more authority than they have held to be generous, fruitful, and humane. But it is not only Gaius and Titius. In another little book, whose author I will call Orbilius, I find that the same operation, under the same general anaesthetic, is being carried out. Orbilius chooses for 'debunking' a silly bit of writing on horses, where these animals are praised as the 'willing servants' of the early colonists in Australia.6 And he falls into the same trap as Gaius and Titius. Of Ruksh and Sleipnir and the weeping horses of Achilles and the war-horse in the Book of Job—nay even of Brer Rabbit and of Peter Rabbit—of man's prehistoric piety to 'our brother the ox'—of all that this semi-anthropomorphic treatment of beasts has meant in human history and of the literature where it finds noble or piquant expression—he has not a word to say.7 Even of the problems of animal psychology as they exist for science he says nothing. He contents himself with explaining that horses are not, secundum litteram, interested in colonial expansion.8 This piece of information is really all that his pupils get from him. Why the composition before them is bad, when others that lie open to the same charge are good, they do not hear. Much less do they learn of the two classes of men who are, respectively, above and below the danger of such writing—the man who really knows horses and really loves them, not with anthropomorphic illusions, but with ordinate love, and the irredeemable urban blockhead to whom a horse is merely an old-fashioned means of transport. Some pleasure in their own ponies and dogs they will have lost; some incentive to cruelty or neglect they will have received; some pleasure in their own knowingness will have entered their minds. That is their day's lesson in English, though of English they have learned nothing. Another little portion of the human heritage has been quietly taken from them before they were old enough to understand. I have hitherto been assuming that such teachers as Gaius and Titius do not fully realize what they are doing and do not intend the far-reaching consequences it will actually have. There is, of course, another possibility. What I have called (presuming on their concurrence in a certain traditional system of values) the 'trousered ape' and the 'urban blockhead' may be precisely the kind of man they really wish to produce. The differences between us may go all the way down. They may really hold that the ordinary human feelings about the past or animals or large waterfalls are contrary to reason and contemptible and ought to be eradicated. They may be intending to make a clean sweep of traditional values and start with a new set. That position will be discussed later. If it is the position which Gaius and Titius are holding, I must, for the moment, content myself with pointing out that it is a philosophical and not a literary position. In filling their book with it they have been unjust to the parent or headmaster who buys it and who has got the work of amateur philosophers where he expected the work of professional grammarians. A man would be annoyed if his son returned from the dentist with his teeth untouched and his head crammed with the dentist's obiter dicta on bimetallism or the Baconian theory. But I doubt whether Gaius and Titius have really planned, under cover of teaching English, to propagate their philosophy. I think they have slipped into it for the following reasons. In the first place, literary criticism is difficult, and what they actually do is very much easier. To explain why a bad treatment of some basic human emotion is bad literature is, if we exclude all question-begging attacks on the emotion itself, a very hard thing to do. Even Dr Richards, who first seriously tackled the problem of badness in literature, failed, I think, to do it. To 'debunk' the emotion, on the basis of a commonplace rationalism, is within almost anyone's capacity. In the second place, I think Gaius and Titius may have honestly misunderstood the pressing educational need of the moment. They see the world around them swayed by emotional propaganda—they have learned from tradition that youth is sentimental—and they conclude that the best thing they can do is to fortify the minds of young people against emotion. My own experience as a teacher tells an opposite tale. For every one pupil who needs to be guarded from a weak excess of sensibility there are three who need to be awakened from the slumber of cold vulgarity. The task of the modern educator is not to cut down jungles but to irrigate deserts. The right defence against false sentiments is to inculcate just sentiments. By starving the sensibility of our pupils we only make them easier prey to the propagandist when he comes. For famished nature will be avenged and a hard heart is no infallible protection against a soft head. But there is a third, and a profounder, reason for the procedure which Gaius and Titius adopt. They may be perfectly ready to admit that a good education should build some sentiments while destroying others. They may endeavour to do so. But it is impossible that they should succeed. Do what they will, it is the 'debunking' side of their work, and this side alone, which will really tell. In order to grasp this necessity clearly I must digress for a moment to show that what may be called the educational predicament of Gaius and Titius is different from that of all their predecessors. Until quite modern times all teachers and even all men believed the universe to be such that certain emotional reactions on our part could be either congruous or incongruous to it—believed, in fact, that objects did not merely receive, but could merit, our approval or disapproval, our reverence or our contempt. The reason why Coleridge agreed with the tourist who called the cataract sublime and disagreed with the one who called it pretty was of course that he believed inanimate nature to be such that certain responses could be more 'just' or 'ordinate' or 'appropriate' to it than others. And he believed (correctly) that the tourists thought the same. The man who called the cataract sublime was not intending simply to describe his own emotions about it: he was also claiming that the object was one which merited those emotions. But for this claim there would be nothing to agree or disagree about. To disagree with This is pretty if those words simply described the lady's feelings, would be absurd: if she had said I feel sick Coleridge would hardly have replied No; I feel quite well. When Shelley, having compared the human sensibility to an Aeolian lyre, goes on to add that it differs from a lyre in having a power of 'internal adjustment' whereby it can 'accommodate its chords to the motions of that which strikes them',9 he is assuming the same belief. 'Can you be righteous', asks Traherne, 'unless you be just in rendering to things their due esteem? All things were made to be yours and you were made to prize them according to their value.'10St Augustine defines virtue as ordo amoris, the ordinate condition of the affections in which every object is accorded that kind of degree of love which is appropriate to it.11 Aristotle says that the aim of education is to make the pupil like and dislike what he ought.12 When the age for reflective thought comes, the pupil who has been thus trained in 'ordinate affections' or 'just sentiments' will easily find the first principles in Ethics; but to the corrupt man they will never be visible at all and he can make no progress in that science.13 Plato before him had said the same. The little human animal will not at first have the right responses. It must be trained to feel pleasure, liking, disgust, and hatred at those things which really are pleasant, likeable, disgusting and hateful.14 In the Republic, the well-nurtured youth is one 'who would see most clearly whatever was amiss in ill-made works of man or ill- grown works of nature, and with a just distaste would blame and hate the ugly even from his earliest years and would give delighted praise to beauty, receiving it into his soul and being nourished by it, so that he becomes a man of gentle heart. All this before [s]he is of an age to reason; so that when Reason at length comes to him, then, bred as he has been, [s]he will hold out his hands in welcome and recognize her because of the affinity he bears to her.'15 In early Hinduism that conduct in men which can be called good consists in conformity to, or almost participation in, the Rta—that great ritual or pattern of nature and supernature which is revealed alike in the cosmic order, the moral virtues, and the ceremonial of the temple. Righteousness, correctness, order, the Rta, is constantly identified with satya or truth, correspondence to reality. As Plato said that the Good was 'beyond existence' and Wordsworth that through virtue the stars were strong, so the Indian masters say that the gods themselves are born of the Rta and obey it.16 The Chinese also speak of a great thing (the greatest thing) called the Tao. It is the reality beyond all predicates, the abyss that was before the Creator Himself. It is Nature, it is the Way, the Road. It is the Way in which the universe goes on, the Way in which things everlastingly emerge, stilly and tranquilly, into space and time. It is also the Way which every man should tread in imitation of that cosmic and supercosmic progression, conforming all activities to that great exemplar.17 'In ritual', say the Analects, 'it is harmony with Nature that is prized.'18 The ancient Jews likewise praise the Law as being 'true'.19 This conception in all its forms, Platonic, Aristotelian, Stoic, Christian, and Oriental alike, I shall henceforth refer to for brevity simply as 'the Tao'. Some of the accounts of it which I have quoted will seem, perhaps, to many of you merely quaint or even magical. But what is common to them all is something we cannot neglect. It is the doctrine of objective value, the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are. Those who know the Tao can hold that to call children delightful or old men venerable is not simply to record a psychological fact about our own parental or filial emotions at the moment, but to recognize a quality which demands a certain response from us whether we make it or not. I myself do not enjoy the society of small children: because I speak from within the Tao I recognize this as a defect in myself—just as a man may have to recognize that he is tone deaf or colour blind. And because our approvals and disapprovals are thus recognitions of objective value or responses to an objective order, therefore emotional states can be in harmony with reason (when we feel liking for what ought to be approved) or out of harmony with reason (when we perceive that liking is due but cannot feel it). No emotion is, in itself, a judgement; in that sense all emotions and sentiments are alogical. But they can be reasonable or unreasonable as they conform to Reason or fail to conform. The heart never takes the place of the head: but it can, and should, obey it. Over against this stands the world of The Green Book. In it the very possibility of a sentiment being reasonable—or even unreasonable—has been excluded from the outset. It can be reasonable or unreasonable only if it conforms or fails to conform to something else. To say that the cataract is sublime means saying that our emotion of humility is appropriate or ordinate to the reality, and thus to speak of something else besides the emotion; just as to say that a shoe fits is to speak not only of shoes but of feet. But this reference to something beyond the emotion is what Gaius and Titius exclude from every sentence containing a predicate of value. Such statements, for them, refer solely to the emotion. Now the emotion, thus considered by itself, cannot be either in agreement or disagreement with Reason. It is irrational not as a paralogism is irrational, but as a physical event is irrational: it does not rise even to the dignity of error. On this view, the world of facts, without one trace of value, and the world of feelings, without one trace of truth or falsehood, justice or injustice, confront one another, and no rapprochement is possible. Hence the educational problem is wholly different according as you stand within or without the Tao. For those within, the task is to train in the pupil those responses which are in themselves appropriate, whether anyone is making them or not, and in making which the very nature of man consists. Those without, if they are logical, must regard all sentiments as equally non-rational, as mere mists between us and the real objects. As a result, they must either decide to remove all sentiments, as far as possible, from the pupil's mind; or else to encourage some sentiments for reasons that have nothing to do with their intrinsic 'justness' or 'ordinacy'. The latter course involves them in the questionable process of creating in others by 'suggestion' or incantation a mirage which their own reason has successfully dissipated.

### Dewey

#### Role of educational institutions is to eliminate defects from society

Dewey, John. Democracy And Education : An Introduction To The Philosophy Of Education. Waiheke Island: The Floating Press, 2009. eBook Collection (EBSCOhost). Web. 9 Feb. 2017. NP

In the second place, it is the business of the school environment to eliminate, so far as possible, the unworthy features of the existing environment from influence upon mental habitudes. It establishes a purified medium of action. Selection aims not only at simplifying but at weeding out what is undesirable. Every society gets encumbered with what is trivial, with dead wood from the past, and with what is positively perverse. The school has the duty of omitting such things from the environment which it supplies, and thereby doing what it can to counteract their influence in the ordinary social environment. By selecting the best for its exclusive use, it strives to reinforce the power of this best. As a society becomes more enlightened, it realizes that it is responsible not to transmit and conserve the whole of its existing achievements, but only such as make for a better future society. The school is its chief agency for the accomplishment of this end.

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### Gey

Lawrence is wrong

Gey 96, Steven G. The Case against Postmodern Censorship Theory. University of Pennsylvania Law Review, Vol. 145, No. 2 (Dec., 1996), pp. 193-297. NP 2/14/17.

The alternative, and far more common, explanation of Brown is

that the Court held segregated public schools unconstitutional

primarily because such schools provided black children with a

measurably inferior education than that which they provided to white

students. This interpretation maintains that the Court was concerned

not so much with the message of segregation as with the mechanisms

of segregation and the concrete effects such mechanisms had on the

lives of black children. The actual holding of the case, after all, is

that "[s]eparate educational facilities are inherently unequal."16

According to this interpretation, the "feeling of inferiority" 7 to

which ChiefJustice Warren referred is relevant in that it contributes

in specific ways to the concrete reality of segregation, most directly

by making it harder for black children to achieve the same level of

educational attainment as the more privileged white children.'8

Under this interpretation, Brownwas primarily directed at eliminating

every manifestation of government-enforced educational, political

and social ostracism; the Court assumed that eliminating these

concrete effects would also diminish the force of the ideological

racism that justified segregation

#### Attacking the ability to engage in public debate by claiming that discussion is distorted only leads to new distortions, opening up power for arbitrary governmental interference against the interests of individuals who complain about certain speech

Gey 96, Steven G. The Case against Postmodern Censorship Theory. University of Pennsylvania Law Review, Vol. 145, No. 2 (Dec., 1996), pp. 193-297. NP 2/14/17.

Thus, critical race theorists do not propose to eliminate the distortions they find in the marketplace; on the contrary, they propose to distort the market intentionally in a different way. One set of ideas will be favored over another, as critical race theorists argue is presently the case. But even accepting the critical race theorists' view that one particular set of ideas currently serves as a "reigning paradigm" governing society, 2 there is still a crucial difference between their proposed system and the one it would replace. Under the system proposed by critical race theorists, the new reigning paradigm would be enforceable through an entire set of sanctions not currently available to enforce ideological conformity: fines, civil damages and even jail sentences."8 And of course, there is always the possibility that the critical race theorists' attacks on the First Amendment will be only partly successful. It does not take much imagination to conceive of the possibility that very different ideological forces could turn the critical race theorists' system to very different ends than Lawrence, Delgado and Matsuda would like. After the well-meaning critical race theorists have eliminated most or all constitutional restrictions on government regulation of speech, the predominant forces in the government could easily choose to use their new powers in ways that reinforce the very "reigning paradigm" that the critical race theorists now find so oppressive. I will return to these and other problems associated with the critical race theory approach to social constructionism after briefly reviewing two other similar postmodern censorship theories.

#### The notion that the government is responsible for resisting negative effects of speech on individual’s construction of identity makes them authoritative on what constitutes the good, undermining autonomy and democracy

Gey 96, Steven G. The Case against Postmodern Censorship Theory. University of Pennsylvania Law Review, Vol. 145, No. 2 (Dec., 1996), pp. 193-297. NP 2/14/17.

MacKinnon's argument, like that of critical race theorists, proceeds logically to a conclusion that is fundamentally at odds with the modern Western view of the proper relationship between a government and its citizens. The notion that "bad" speech "constructs" people in negative ways, and that this negative social construction is properly the concern of the government, leads necessarily to the corollary that the government is properly concerned with "constructing" a society of "good" people. Under this theory, one of the government's main tasks (assuming the government is controlled by a working majority of "good" officials who are themselves correctly constructed) is to create a citizenry in its own image. This is directly contrary to the relationship between citizens and the government that serves as the basis for modern democratic theory.

Gey 96, Steven G. The Case against Postmodern Censorship Theory. University of Pennsylvania Law Review, Vol. 145, No. 2 (Dec., 1996), pp. 193-297. NP 2/14/17.

### Fire

Fire Intern July 20, 2015, 7-20-2015, "The Case for Hate Speech," FIRE, https://www.thefire.org/the-case-for-hate-speech/, accessed 2-14-2017

#### Hate speech is definitely protected

Fire Intern 15. July 20, 2015, 7-20-2015, "The Case for Hate Speech," FIRE, https://www.thefire.org/the-case-for-hate-speech/, accessed 2-14-2017. NP

Disappointingly, when discussing free speech and its value to society, I have become accustomed to some variant of the inevitable rejoinder: “Hate speech is not free speech.” This maxim has been repeated in discussions about everything from the protest against portrayal of the prophet Muhammad to the controversy surrounding the Confederate battle flag. It has been parroted by nationally syndicated news personalities under the guise of constitutional truth. I have seen it painted without irony on the free speech wall of my own college. Just as with free speech, there is a distinction to be drawn between hate speech in a legal context and hate speech as a more abstract concept. I would submit, however, that regardless of whether we are speaking legally or conceptually, “hate speech” can prove valuable to public understanding and must be protected. In the United States, hate speech is not a recognized exception to the free speech protections under the First Amendment. Put simply, the vast majority of “hate speech” is free speech. In the 1969 Supreme Court decision Brandenburg v. Ohio, the justices assessed speech that would be considered “hate” by most people’s colloquial definitions: at issue was a Ku Klux Klan leader’s inflammatory speech urging listeners to take revenge on racial minorities. The court held that it did not constitute an incitement of lawlessness and was therefore constitutionally protected. Similarly, in R.A.V. v. City of St. Paul, the court overturned a teenager’s conviction for burning a cross on a black family’s lawn. In R.A.V., the content of speech was determined to be an inadequate justification for prohibition. The right to the undoubtedly hateful speech of the Westboro Baptist Church was also upheld in Snyder v. Phelps, which dealt with the members’ protest ahead of a soldier’s funeral. The judgments in these cases establish a strong precedent against any sort of legislative attempt to punish hate speech in the United States. To say that hate speech is not free speech in America is plainly false. The judiciary comprehends the imprudence of allowing a centralized authority to regulate not just what one is allowed to say, but what one is allowed to hear. One of FIRE’s co-founders, Alan Charles Kors, when talking about the importance of protecting hateful speech, recalls a scene from Robert Bolt’s play A Man for All Seasons. In it, Thomas More states his refusal to arrest Richard Rich, a man who later conspires to have More convicted on false pretense, even “[i]f he were the Devil himself until he broke the law.” Upon hearing this, Roper, More’s zealous son-in-law-to-be, asserts that he would cut down every law in England to get after the Devil. More responds: And when the last law was down, and the Devil turned round on you where would you hide, Roper, the laws all being flat? … This country’s planted thick with laws from coast to coast – Man’s laws, not God’s — and if you cut them down – and you’re just the man to do it – d’you really think you could stand upright in the winds that would blow then? … Yes, I’d give the Devil benefit of law, for my own safety’s sake! The question More poses evokes another: Who watches the watchmen? If the law is thrown aside in order to prosecute some nebulous “bad,” what will happen to the “good” when the roles are reversed? If hate speech is to be defined, who gets to say what it is and is not?

#### Censorship of hate speech represents a failure of higher education

Fire Intern 15. July 20, 2015, 7-20-2015, "The Case for Hate Speech," FIRE, https://www.thefire.org/the-case-for-hate-speech/, accessed 2-14-2017. NP

This problem is not at all hypothetical. A recent example in Britain demonstrates how this can be abused. As a last ditch ploy to woo Muslim voters in the United Kingdom, Labour party candidate Ed Miliband promised to make criticism of Islam a crime. And in France, following the Charlie Hebdo killings (which some seem to believe was a justified reaction to hate speech), authorities arrested, among others, comedian Deiudonné M’bala M’bala for a Facebook post expressing solidarity with Amedy Coulibaly, one of the shooters associated with the attack. Thankfully, American legislatures cannot enact laws authorizing this sort of action. But as universities seek to suppress a broader range of speech they deem hateful, the power to control what students and faculty may discuss settles increasingly into the hands of campus administrators. This is of immediate concern to those who hold unpopular views. As Bolt’s Thomas More suggested, those who support administrators exercising discretion in this way might start to have their own viewpoints banned when the winds change. Many will argue that speech can be both valuable and hateful, and many see offensive comedy and criticism of Islam as examples of that concept. But what about a more exclusive definition of hate speech limited to the most apparently unacceptable and frequently outlandish ideas? Is there any intrinsic value in Holocaust denial or advocacy of genocide? In his book Freedom From Speech, FIRE president Greg Lukianoff says, “I believe the even greater failure of higher education is neglecting to teach the intellectual habits that promote debate and discussion, tolerance for views we hate, epistemic humility, and genuine pluralism.” Why not ask ourselves how we know that the Holocaust occurred? Ideas are like muscles—they atrophy if they are not properly exercised. Which is preferable: a person who accepts the Holocaust’s historicity based exclusively on the fact that it is what they have been told, or a person who experiences doubt and examines original documents, meets people with serial numbers tattooed on their arms, and visits the death camps or the mass graves? The fundamental point of epistemic humility is that it is not enough for a person to believe the truth; they should believe the truth for the right reasons. A quotation attributed to Aristotle, and wise regardless of the original source, goes, “It is the mark of an educated mind to be able to entertain a thought without accepting it.” Some ideas are repugnant, and some people will hold these ideas against all reason. Even so, there is something to be learned from seeing a person express such an idea, if not from the idea itself. Ken Miller, an alumnus and professor at Brown University, penned an article describing the most unforgettable speaker he ever heard at the university. The leader of the American Nazi Party, himself a Brown alumnus, had come to speak. Miller learned firsthand the charisma with which pernicious ideas could be expressed. He understood the “allure” of fascism. Such an experience afforded students a visceral understanding both of history and of their own vulnerability. It was then perhaps the speaking, and not the speech, that was of lasting value. If such lofty academic idealism fails to persuade, perhaps the simplest reason to permit such speech is that, as FIRE’s co-founder, Harvey Silverglate, put it: “If there are Nazis in the room, I want to know who they are so that I can keep an eye on them.”

### Soave

#### Success of people that oppose social progress is possible because of the silencing of alternate viewpoints – restricting speech only enhances hateful views

Soav 16. Robby Soav, 11-9-2016, "Trump Won Because Leftist Political Correctness Inspired a Terrifying Backlash," Reason, http://reason.com/blog/2016/11/09/trump-won-because-leftist-political-corr, accessed 2-17-2017. NP

Many will say Trump won because he successfully capitalized on blue collar workers' anxieties about immigration and globalization. Others will say he won because America rejected a deeply unpopular alternative. Still others will say the country is simply racist to its core. But there's another major piece of the puzzle, and it would be a profound mistake to overlook it. Overlooking it was largely the problem, in the first place. Trump won because of a cultural issue that flies under the radar and remains stubbornly difficult to define, but is nevertheless hugely important to a great number of Americans: political correctness. More specifically, Trump won because he convinced a great number of Americans that he would destroy political correctness. I have tried to call attention to this issue for years. I have warned that political correctness actually is a problem on college campuses, where the far-left has gained institutional power and used it to punish people for saying or thinking the wrong thing. And ever since Donald Trump became a serious threat to win the GOP presidential primaries, I have warned that a lot of people, both on campus and off it, were furious about political-correctness-run-amok—so furious that they would give power to any man who stood in opposition to it. I have watched this play out on campus after campus. I have watched dissident student groups invite Milo Yiannopoulos to speak—not because they particularly agree with his views, but because he denounces censorship and undermines political correctness. I have watched students cheer his theatrics, his insulting behavior, and his narcissism solely because the enforcers of campus goodthink are outraged by it. It's not about his ideas, or policies. It's not even about him. It's about vengeance for social oppression. Trump has done to America what Yiannopoulos did to campus. This is a view Yiannopoulos shares. When I spoke with him about Trump's success months ago, he told me, "Nobody votes for Trump or likes Trump on the basis of policy positions. That's a misunderstanding of what the Trump phenomenon is." He described Trump as "an icon of irreverent resistance to political correctness." Correctly, I might add. What is political correctness? It's notoriously hard to define. I recently appeared on a panel with CNN's Sally Kohn, who described political correctness as being polite and having good manners. That's fine—it can mean different things to different people. I like manners. I like being polite. That's not what I'm talking about. The segment of the electorate who flocked to Trump because he positioned himself as "an icon of irreverent resistance to political correctness" think it means this: smug, entitled, elitist, privileged leftists jumping down the throats of ordinary folks who aren't up-to-date on the latest requirements of progressive society. Example: A lot of people think there are only two genders—boy and girl. Maybe they're wrong. Maybe they should change that view. Maybe it's insensitive to the trans community. Maybe it even flies in the face of modern social psychology. But people think it. Political correctness is the social force that holds them in contempt for that, or punishes them outright. If you're a leftist reading this, you probably think that's stupid. You probably can't understand why someone would get so bent out of shape about being told their words are hurtful. You probably think it's not a big deal and these people need to get over themselves. Who's the delicate snowflake now, huh? you're probably thinking. I'm telling you: your failure to acknowledge this miscalculation and adjust your approach has delivered the country to Trump. There's a related problem: the boy-who-cried-wolf situation. I was happy to see a few liberals, like Bill Maher, owning up to it. Maher admitted during a recent show that he was wrong to treat George Bush, Mitt Romney, and John McCain like they were apocalyptic threats to the nation: it robbed him of the ability to treat Trump more seriously. The left said McCain was a racist supported by racists, it said Romney was a racist supported by racists, but when an actually racist Republican came along—and racists cheered him—it had lost its ability to credibly make that accusation. This is akin to the political-correctness-run-amok problem: both are examples of the left's horrible over-reach during the Obama years. The leftist drive to enforce a progressive social vision was relentless, and it happened too fast. I don't say this because I'm opposed to that vision—like most members of the under-30 crowd, I have no problem with gender neutral pronouns—I say this because it inspired a backlash that gave us Trump. My liberal critics rolled their eyes when I complained about political correctness. I hope they see things a little more clearly now. The left sorted everyone into identity groups and then told the people in the poorly-educated-white-male identity group that that's the only bad one. It mocked the members of this group mercilessly. It punished them for not being woke enough. It called them racists. It said their video games were sexist. It deployed Lena Dunham to tell them how horrible they were. Lena Dunham! I warned that political-correctness-run-amok and liberal overreach would lead to a counter-revolution if unchecked. That counter-revolution just happened. There is a cost to depriving people of the freedom (in both the legal and social senses) to speak their mind. The presidency just went to the guy whose main qualification, according to his supporters, is that he isn't afraid to speak his.

### Levinovitz

#### Limitations on free speech lead to marginalization of religious minorities and lack of change in problematic ideologies

Levinovitz 16. ALAN LEVINOVITZ AUG 30, 2016. How Trigger Warnings Silence Religious Students. <https://www.theatlantic.com/politics/archive/2016/08/silencing-religious-students-on-campus/497951/> NP 2/17/17.

Last week, the University of Chicago’s dean of students sent a welcome letter to freshmen decrying trigger warnings and safe spaces—ways for students to be warned about and opt out of exposure to potentially challenging material. While some supported the school’s actions, arguing that these practices threaten free speech and the purpose of higher education, the note also led to widespread outrage, and understandably so. Considered in isolation, trigger warnings may seem straightforwardly good. Basic human decency means professors like myself should be aware of students’ traumatic experiences, and give them a heads up about course content—photographs of dead bodies, extended accounts of abuse, disordered eating, self-harm—that might trigger an anxiety attack and foreclose intellectual engagement. Similarly, it may seem silly to object to the creation of safe spaces on campus, where members of marginalized groups can count on meeting supportive conversation partners who empathize with their life experiences, and where they feel free to be themselves without the threat of judgment or censure. LATEST FROM POLITICS The Donald Trump Cabinet Tracker In response to the letter, some have argued that the dean willfully ignored or misunderstood these intended purposes to play up a caricature of today’s college students as coddled and entitled. Safe spaces and trigger warnings pose no real threat to free speech, these critics say—that idea is just a specter conjured up by crotchety elites who fear empowered students. Perhaps. But as a professor of religious studies, I know firsthand how debates about trigger warnings and safe spaces can have a chilling effect on classroom discussions. It’s not my free speech I’m worried about; professors generally feel confident presenting difficult or controversial material, although some may fear for their jobs after seeing other faculty members subjected to intense and public criticism. Students, on the other hand, do not have that assurance. Their ability to speak freely in the classroom is currently endangered—but not in the way some of their peers might think. Although trigger warnings and safe spaces claim to create an environment where everyone is free to speak their minds, the spirit of tolerance and respect that inspires these policies can also stifle dialogue about controversial topics, particularly race, gender, and, in my experience, religious beliefs. Students should be free to argue their beliefs without fear of being labeled intolerant or disrespectful, whether they think certain sexual orientations are forbidden by God, life occurs at the moment of conception, or Islam is the exclusive path to salvation; and conversely, the same freedom should apply to those who believe God doesn’t care about who we have sex with, abortion is a fundamental right, or Islam is based on nothing more than superstitious nonsense. As it stands, that freedom does not exist in most academic settings, except when students’ opinions line up with what can be broadly understood as progressive political values. Trigger warnings and safe spaces are terms that reflect the values of the communities in which they’re used. The loudest, most prominent advocates of these practices are often the people most likely to condemn Western yoga as “cultural appropriation,” to view arguments about the inherent danger of Islam as hate speech, or to label arguments against affirmative action as impermissible microaggressions. These advocates routinely use the word “ally” to describe those who support their positions on race, gender, and religion, implying that anyone who disagrees is an “enemy.” Understood in this broader context, trigger warnings and safe spaces are not merely about allowing traumatized students access to education. Whatever their original purpose may have been, trigger warnings are now used to mark discussions of racism, sexism, and U.S. imperialism. The logic of this more expansive use is straightforward: Any threat to one’s core identity, especially if that identity is marginalized, is a potential trigger that creates an unsafe space. Trigger warnings are now used to mark discussions of racism, sexism, and U.S. imperialism. But what about situations in which students encounter this kind of discussion from fellow students? Would a University of Chicago freshman want to express an opinion that might make her someone’s enemy? Would she want to be responsible for intolerant, disrespectful hate speech that creates an unsafe space? Best, instead, to remain silent. This attitude is a disaster in the religious-studies classroom. As the Boston University professor Stephen Prothero put it in his book God Is Not One, “Students are good with ‘respectful,’ but they are allergic to ‘argument.’” Religion can be an immensely important part of one’s identity—for many, more important than race or sexual orientation. To assert that a classmate’s most deeply held beliefs are false or evil is to attack his or her identity, arguably similar to the way in which asserting that a transgender person is mistaken about their gender is an attack on their identity. Objections to “anti-Muslim” campus speakers as promoting “hate speech” and creating a “hostile learning environment” vividly illustrate the connection between contentious assertions about religion, trigger warnings, and safe spaces. The claim that Islam—or, by implication, any religious faith—is false or dangerous is indistinguishable from hostile hate speech. To make such a claim in class is to be a potential enemy of fellow students, to marginalize them, disrespect them, and make them feel unsafe. If respect requires refraining from attacking people’s identity, then the only respectful discussion of religion is one in which everyone affirms everyone else’s beliefs, describes those beliefs without passing judgment, or simply remains silent. As Prothero notes, that’s usually what ends up happening. According to anonymous in-class surveys, about one-third of my students believe in the exclusive salvific truth of Christianity. But rarely do these students defend their beliefs in class. In private, they have told me that they believe doing so could be construed as hateful, hostile, intolerant, and disrespectful; after all, they’re saying that if others don’t believe what they do, they’ll go to hell. Then there are my students, about one-fourth of them, who think no religion is true. They probably agree with Thomas Jefferson that the final book of the New Testament is “merely the ravings of a maniac, no more worthy, nor capable of explanation, than the incoherences of our own nightly dreams.” But they’d never say so in class. This kind of comment would likely seem even worse when directed at religious minorities, including those who practice Judaism, Islam, or Buddhism. One could make the case that students who refrain from religious debate are making a mistake by confusing religious identity, which is free game for criticism, with racial and gender identity, which are not. Racial and gender identity deserve special consideration because they are unchosen aspects of one’s biological and historical self, while religious identity is a set of propositions about reality that can be accepted or rejected on the basis of evidence and argument. But this argument is itself controversial. Religion is a part of one’s historical self, and to reject religious beliefs often means rejecting family and friends. (Nor, as Jews can attest, are the categories of religion and race separable.) Religion also has a great deal to say about sex and gender, and may shape people’s perceptions of their own sexuality or gender identity. There is a very real danger that these efforts will become overzealous and render opposing opinions taboo. The unpleasant truth is that historically marginalized groups, including racial minorities and members of the LGBT community, are not the only people whose beliefs and identities are marginalized on many college campuses. Those who believe in the exclusive truth of a single revealed religion or those who believe that all religions are nonsensical are silenced by the culture of trigger warnings and safe spaces. I know this is true because I know these students are in my classroom, but I rarely hear their opinions expressed in class. There is no doubt that in America, the perspective of white, heterosexual Christian males has enjoyed disproportionate emphasis, particularly in higher education. Trigger warnings, safe spaces, diversity initiatives, and attention to social justice: all of these are essential for pushing back against this lopsided power dynamic. But there is a very real danger that these efforts will become overzealous and render opposing opinions taboo. Instead of dialogues in which everyone is fairly represented, campus conversations about race, gender, and religion will devolve into monologues about the virtues of tolerance and diversity. I have seen it happen, not only at the University of Chicago, my alma mater, but also at the school where I currently teach, James Madison University, where the majority of students are white and Christian. The problem, I’d wager, is fairly widespread, at least at secular universities. Silencing these voices is not a good thing for anyone, especially the advocates of marginalized groups who hope to sway public opinion. Take for example the idea that God opposes homosexuality, a belief that some students still hold. On an ideal campus, these students would feel free to voice their belief. They would then be confronted by opposing arguments, spoken, perhaps, by the very people whose sexual orientation they have asserted is sinful. At least in this kind of environment, these students would have an opportunity to see the weaknesses in their position and potentially change their minds. But if students do not feel free to voice their opinions, they will remain silent, retreating from the classroom to discuss their position on homosexuality with family, friends, and other like-minded individuals. They will believe, correctly in some cases, that advocates of gay rights see them as hateful, intolerant bigots who deserve to be silenced, and which may persuade them to cling with even greater intensity to their convictions. A more charitable interpretation of the University of Chicago letter is that it is meant to inoculate students against allergy to argument. Modern, secular, liberal education is supposed to combine a Socratic ideal of the examined life with a Millian marketplace of ideas. It is boot camp, not a hotel. In theory, this will produce individuals who have cultivated their intellect and embraced new ideas via communal debate—the kind of individuals who make good neighbors and citizens. The communal aspect of the debate is important. It demands patience, open-mindedness, empathy, the courage to question others and be questioned, and above all, attempting to see things as others do. But even though academic debate takes place in a community, it is also combat. Combat can hurt. It is literally offensive. Without offense there is no antagonistic dialogue, no competitive marketplace, and no chance to change your mind. Impious, disrespectful Socrates was executed in Athens for having the temerity to challenge people’s most deeply held beliefs. It would be a shame to execute him again.

### ACLU

#### Speech codes are a quick fix that mask the reality of hatred and prevent more robust solutions to the route cause of harms

ACLU. Hate Speech on Campus. https://www.aclu.org/other/hate-speech-campus

Where racist, sexist and homophobic speech is concerned, the ACLU believes that more speech -- not less -- is the best revenge. This is particularly true at universities, whose mission is to facilitate learning through open debate and study, and to enlighten. Speech codes are not the way to go on campuses, where all views are entitled to be heard, explored, supported or refuted. Besides, when hate is out in the open, people can see the problem. Then they can organize effectively to counter bad attitudes, possibly change them, and forge solidarity against the forces of intolerance. College administrators may find speech codes attractive as a quick fix, but as one critic put it: "Verbal purity is not social change." Codes that punish bigoted speech treat only the symptom: The problem itself is bigotry. The ACLU believes that **instead of opting for gestures that only appear to cure the disease, universities have to do the hard work** of recruitment to increase faculty and student diversity; counseling to raise awareness about bigotry and its history, and changing curricula to institutionalize more inclusive approaches to all subject matter.

### Malik

#### Banning bigotry lets sentiments fester underground and show in more virulent ways

Malik 12, Kenan. (Malik is a writer, lecturer and broadcaster) Why Hate Speech Should Not Be Banned. <https://kenanmalik.wordpress.com/2012/04/19/why-hate-speech-should-not-be-banned/> NP 2/22/17.

KM: I believe that no speech should be banned solely because of its content; I would distinguish ‘content-based’ regulation from ‘effects-based’ regulation and permit the prohibition only of speech that creates imminent danger. I oppose content-based bans both as a matter of principle and with a mind to the practical impact of such bans. Such laws are wrong in principle because free speech for everyone except bigots is not free speech at all. It is meaningless to defend the right of free expression for people with whose views we agree. The right to free speech only has political bite when we are forced to defend the rights of people with whose views we profoundly disagree. And in practice, you cannot reduce or eliminate bigotry simply by banning it. You simply let the sentiments fester underground. As Milton once put it, to keep out ‘evil doctrine’ by licensing is ‘like the exploit of that gallant man who thought to pound up the crows by shutting his Park-gate’. Take Britain. In 1965, Britain prohibited incitement to racial hatred as part of its Race Relations Act. The following decade was probably the most racist in British history. It was the decade of ‘Paki-bashing’, when racist thugs would seek out Asians to beat up. It was a decade of firebombings, stabbings, and murders. In the early 1980s, I was organizing street patrols in East London to protect Asian families from racist attacks. Nor were thugs the only problem. Racism was woven into the fabric of public institutions. The police, immigration officials – all were openly racist. In the twenty years between 1969 and 1989, no fewer than thirty-seven blacks and Asians were killed in police custody – almost one every six months. The same number again died in prisons or in hospital custody. When in 1982, cadets at the national police academy were asked to write essays about immigrants, one wrote, ‘Wogs, nignogs and Pakis come into Britain take up our homes, our jobs and our resources and contribute relatively less to our once glorious country. They are, by nature, unintelligent. And can’t at all be educated sufficiently to live in a civilised society of the Western world’. Another wrote that ‘all blacks are pains and should be ejected from society’. So much for incitement laws helping create a more tolerant society. aToday, Britain is a very different place. Racism has not disappeared, nor have racist attacks, but the open, vicious, visceral bigotry that disfigured the Britain when I was growing up has largely ebbed away. It has done so not because of laws banning racial hatred but because of broader social changes and because minorities themselves stood up to the bigotry and **fought back**. Of course, as the British experience shows, hatred exists not just in speech but also has physical consequences. Is it not important, critics of my view ask, to limit the fomenting of hatred to protect the lives of those who may be attacked? In asking this very question, they are revealing the distinction between speech and action. Saying something is not the same as doing it. But, in these post-ideological, postmodern times, it has become very unfashionable to insist on such a distinction. In blurring the distinction between speech and action, what is really being blurred is the idea of human agency and of moral responsibility. Because lurking underneath the argument is the idea that people respond like automata to words or images. But people are not like robots. They think and reason and act on their thoughts and reasoning. Words certainly have an impact on the real world, but that impact is mediated through human agency.

#### Labeling arguments as hate speech is to refuse to engage with them and undermine the foundation of democracy

Malik 12, Kenan. (Malik is a writer, lecturer and broadcaster) Why Hate Speech Should Not Be Banned. <https://kenanmalik.wordpress.com/2012/04/19/why-hate-speech-should-not-be-banned/> NP 2/22/17.

KM: Free speech and democracy are intimately linked. Without free speech there is no democracy. That is why any restriction on speech must be kept to the absolute minimum. There are two ways in which banning hate speech undermines democracy. First, democracy can only work if every citizen believes that their voice counts. That however outlandish, outrageous, or obnoxious one’s belief may be, they nevertheless have the right to express it and to try to win support for it. When people feel they no longer possess that right, then democracy itself suffers, as does the legitimacy of those in power. Not just the banning of hate speech but the very categorization of an argument or a sentiment as ‘hate speech’ can be problematic for the democratic process. I am in no doubt that some speech is designed to promote hatred. And I accept that certain arguments – like the direct incitement of violence – should indeed be unlawful. But the category ‘hate speech’ has come to function quite differently from prohibitions on incitement to violence. It has become a means of rebranding obnoxious political arguments as immoral and so beyond the boundaries of accepted reasonable debate. It makes certain sentiments illegitimate, thereby disenfranchising those who hold such views. And this brings me to the second point as to why the banning of hate speech undermines democracy. Branding an opinion as ‘hate speech’ does not simply disenfranchise those holding such a view; it also absolves the rest of us of the responsibility of politically challenging it. Where once we might have challenged obnoxious or hateful sentiments politically, today we are more likely simply to seek to outlaw them. In 2007, James Watson, the codiscoverer of the structure of DNA, claimed of Africans that their ‘intelligence is not the same as ours’ and that blacks are genetically intellectually inferior. He was rightly condemned for his arguments. But most of those who condemned him did not bother challenging the arguments, empirically or politically. They simply insisted that it is morally unacceptable to imagine that blacks are intellectually inferior. Britain’s Equality and Human Rights Commission studied the remarks to see if it could bring any legal action. London’s Science Museum, at which Watson was to have delivered a lecture, canceled his appearance, claiming that the Nobel Laureate had ‘gone beyond the point of acceptable debate.’ New York’s Cold Spring Harbor Laboratory, of which Watson was director, not only disowned Watson’s remarks but forced him eventually to resign. I fundamentally disagree with Watson. Indeed I have written more than one book challenging such ideas, and have many times publicly debated their supporters. But I also think that it was as legitimate for Watson to have expressed his opinion as it is for me to express mine, even if I believe his assertion was factually wrong, morally suspect, and politically offensive. Simply to dismiss Watson’s claim as beyond the bounds of reasonable debate is to refuse to confront the actual arguments, to decline to engage with an idea that clearly has considerable purchase, and therefore to do disservice to democracy.

### Fisher

#### Silencing offensive speech just flips the script and ensures that activists get targeted

Anthony L. Fisher 17, 1-2-2017, "The free-speech problem on campus is real. It will ultimately hurt dissidents.," Vox, http://www.vox.com/the-big-idea/2016/12/13/13931524/free-speech-pen-america-campus-censorship, accessed 2-22-2017 NP

But pretending "problematic" thought doesn’t exist won't make it so; such perspectives should be engaged, defeated, in the public arena of ideas. In perhaps the most cogent line of the entire report, the authors write: “Overreaction to problematic speech may impoverish the environment for speech for all.” In the name of social justice, some students are demanding administrators become the arbiters of what speech is legitimate and what isn’t. These students don’t seem to grasp that by granting authority figures the power to adjudicate which speakers have the right to be heard, they will inevitably find their own speech silenced when opponents claim offense, fear, or discomfort. Calls for crackdowns on “offensive” speech inevitably boomerang. It’s already happening. Just ask the Palestinian activists whose boycott campaigns against Israel have been deemed hate speech by a number of public universities, and whose future political activities could be endangered by an act of Congress. Just this month, the Senate unanimously passed the "Anti-Semitism Awareness Act,” which directs the Department of Education to use the bill's contents as a guideline when adjudicating complaints of anti-Semitism on campus. Among the speech-chilling components of the bill, the political (and subjective) act of judging Israel by an "unfair double standard" could be considered hate speech.To cite other examples of unintended consequences of the crackdown on “offensive” speech, a black student at the University of Michigan was punished for calling another student “white trash,” and conservative law students at Georgetown claimed they were “traumatized” when an email critical of deceased Supreme Court Justice Antonin Scalia landed in their inboxes. The PEN America report also notes the Foundation for Individual Rights’ analysis of hundreds of campuses with “severely restrictive” speech codes. While a number of these campuses don't aggressively enforce their speech codes, the rules remain on the books; more than a dozen such codes have been overturned in the courts.What’s even more concerning is the increasingly popular notion that some ideas, such as opposition to abortion, should simply be “non-platformed" — that is, deemed unworthy of even being heard on campus. Although the trend of denying contentious speakers such as former Secretary of State Condoleezza Rice or refugee turned Dutch politician and critic of Islam Ayaan Hirsi Ali public platforms by "disinviting" them from campus is disconcerting, it is not censorship.However, a pro-choice group physically blocking the display of a pro-life group on the campus of the University of Georgia is a form of censorship. As is the case of University of California Santa Barbara professor Mireille Miller-Young, who assaulted a young woman holding a pro-life placard including graphic imagery in a "free speech" zone on campus and stole her sign. When the young woman objected to the theft of her property, Miller-Young replied, "I may be a thief, but you're a terrorist." Like it or not, almost half of all Americans consider themselves pro-life. Banning their perspective from campus won't win over converts, and it’s both immoral and counterproductive to declare completely legitimate political perspectives beyond the pale. Think of antiwar protests or demonstrations in support of integration when both causes were broadly unpopular, and then try to consider a majority on campus declaring their school a "safe space" from such "offensive" expressions of free speech.

Anthony L. Fisher 17, 1-2-2017, "The free-speech problem on campus is real. It will ultimately hurt dissidents.," Vox, http://www.vox.com/the-big-idea/2016/12/13/13931524/free-speech-pen-america-campus-censorship, accessed 2-22-2017 NP

The report challenges free speech advocates “to articulate how to reconcile unfettered expression with acute demands for greater equality and inclusion,” suggesting they often ignore the second half of that formulation. However, the authors also argue that “liberal to left-leaning organizations" need to do a better job of "integrating free speech awareness into their agendas." UCLA grad student and pro-Palestinian activist Rahim Kurwa is quoted in the report as saying: “One cannot have diversity and social justice speech in spaces without free speech … free speech is not incompatible with our campaign but essential to it.” He adds: “Social change isn’t frictionless. It only happens with friction. You have to engage.” Perhaps because Kurwa is part of a rare subset of progressive political activism that finds itself imperiled by top-down censorship imposed in the name of sensitivity, he understands how free speech amplifies his voice — even as it provides his opposition with a platform, too. Kurwa needs more of his allies on the left to come to that understanding. The same rights that can be put "in service of a right-wing agenda" (as the Times put it in its piece about the PEN report) are also the best tools available for marginalized voices on the left and everywhere in between. As we approach the "Trump era," perhaps student activists will be less inclined to put their faith in rigidly defined policies executed by faceless authority figures — and more inclined to embrace free speech, in all its unwieldy, essential glory.

### McElwee

#### Hate speech intrinsically aims at undermining minority membership in society and degrading the historically oppressed

Sean McElwee 13, (research associate at Demos) 7-24-2013, "The Case for Censoring Hate Speech," Huffington Post, http://www.huffingtonpost.com/sean-mcelwee/hate-speech-online\_b\_3620270.html, accessed 2-22-2017. NP

It’s interesting to note how closely this idea resembles free market fundamentalism: simply get rid of any coercive rules and the “marketplace of ideas” will naturally produce the best result. Humboldt State University compiled a visual map that charts 150,000 hateful insults aggregated over the course of 11 months in the U.S. by pairing Google‘s Maps API with a series of the most homophobic, racist and otherwise prejudiced tweets. The map’s existence draws into question the notion that the “twittersphere” can organically combat hate speech; hate speech is not going to disappear from twitter on its own. The negative impacts of hate speech cannot be mitigated by the responses of third-party observers, as hate speech aims at two goals. First, it is an attempt to tell bigots that they are not alone. Frank Collins — the neo-Nazi prosecuted in National Socialist Party of America v Skokie (1977) — said, “We want to reach the good people, get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves.” The second purpose of hate speech is to intimidate the targeted minority, leading them to question whether their dignity and social status is secure. In many cases, such intimidation is successful. Consider the number of rapes that go unreported. Could this trend possibly be impacted by Reddit threads like /r/rapingwomen or /r/mensrights? Could it be due to the harassment women face when they even suggest the possibility they were raped? The rape culture that permeates Facebook, Twitter and the public dialogue must be held at least partially responsible for our larger rape culture. Reddit, for instance, has become a veritable potpourri of hate speech; consider Reddit threads like /r/nazi, /r/killawoman, /r/misogny, /r/killingwomen. My argument is not that these should be taken down because they are offensive, but rather because they amount to the degradation of a class that has been historically oppressed. Imagine a Reddit thread for /r/lynchingblacks or /r/assassinatingthepresident. We would not argue that we should sit back and wait for this kind of speech be “outspoken” by positive speech, but that it should be entirely banned. American free speech jurisprudence relies upon the assumption that speech is merely the extension of a thought, and not an action. If we consider it an action, then saying that we should combat hate speech with more positive speech is an absurd proposition; the speech has already done the harm, and no amount of support will defray the victim’s impression that they are not truly secure in this society. We don’t simply tell the victim of a robbery, “Hey, it’s okay, there are lots of other people who aren’t going to rob you.” Similarly, it isn’t incredibly useful to tell someone who has just had their race/gender/sexuality defamed, “There are a lot of other nice people out there.” Those who claim to “defend free speech” when they defend the right to post hate speech online, are in truth backwards. Free speech isn’t an absolute right; no right is weighed in a vacuum. The court has imposed numerous restrictions on speech. Fighting words, libel and child pornography are all banned. Other countries merely go one step further by banning speech intended to intimidate vulnerable groups. The truth is that such speech does not democratize speech, it monopolizes speech. Women, LGBTQ individuals and racial or religious minorities feel intimidated and are left out of the public sphere. On Reddit, for example, women have left or changed their usernames to be more male-sounding lest they face harassment and intimidation for speaking on Reddit about even the most gender-neutral topics. Even outside of the intentionally offensive sub-reddits (i.e. /r/imgoingtohellforthis) misogyny is pervasive. I encountered this when browsing /r/funny.

#### Spillover effect is empirically disproven – other countries with hate speech codes are not totalitarian

Sean McElwee 13, (research associate at Demos) 7-24-2013, "The Case for Censoring Hate Speech," Huffington Post, http://www.huffingtonpost.com/sean-mcelwee/hate-speech-online\_b\_3620270.html, accessed 2-22-2017. NP

While we encourage you to challenge ideas, institutions, events, and practices, we do not permit individuals or groups to attack others based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or medical condition. If anything, the groups to which York refers are nudging Facebook towards actually enforcing its own rules. People who argue against such rules generally portray their opponents as standing on a slippery precipice, tugging at the question "what next?" We can answer that question: Canada, England, France, Germany, The Netherlands, South Africa, Australia and India all ban hate speech. Yet, none of these countries have slipped into totalitarianism. In many ways, such countries are more free when you weigh the negative liberty to express harmful thoughts against the positive liberty that is suppressed when you allow for the intimidation of minorities. As Arthur Schopenhauer said, "the freedom of the press should be governed by a very strict prohibition of all and every anonymity." However, with the Internet the public dialogue has moved online, where hate speech is easy and anonymous. Jeffrey Rosen argues that norms of civility should be open to discussion, but, in today's reality, this issue has already been decided; impugning someone because of their race, gender or orientation is not acceptable in a civil society. Banning hate speech is not a mechanism to further this debate because the debate is over. As Jeremy Waldron argues, hate speech laws prevent bigots from, "trying to create the impression that the equal position of members of vulnerable minorities in a rights-respecting society is less secure than implied by the society's actual foundational commitments." Some people argue that the purpose of laws that ban hate speech is merely to avoid offending prudes. No country, however, has mandated that anything be excised from the public square merely because it provokes offense, but rather because it attacks the dignity of a group -- a practice the U.S. Supreme Court called in Beauharnais v. Illinois (1952) "group libel." Such a standard could easily be applied to Twitter, Reddit and other social media websites. While Facebook's policy as written should be a model, it's enforcement has been shoddy. Again, this isn't an argument for government intervention. The goal is for companies to adopt a European-model hate speech policy, one not aimed at expunging offense, but rather hate. Such a system would be subject to outside scrutiny by users. If this is the standard, the Internet will surely remain controversial, but it can also be free of hate and allow everyone to participate. A true marketplace of ideas must co-exist with a multi-racial society open to people of all genders, orientations and religions, and it can.

### Welch

#### Speech codes are used to silence those who resist the administration

Welch 14, Benjamin, (University of Nebraska-Lincoln) "An Examination of University Speech Codes’ Constitutionality and Their Impact on High-Level Discourse" (2014). Theses from the College of Journalism and Mass Communications. Paper 40. NP 2/22/17.

Simply put, university administration in some capacity is generally responsible for creating most incidents of censorship, though the exact reasons may vary. Ironically, for example, when a code is in place to prevent bullying or harassment, administrators have been found to use that code to punish those who have spoken out against, mocked or criticized them. This theory leaves open the possibility for students to be tricked into supporting rules that ultimately only protect those in power. In “Kindly Inquisitors,” Jonathan Rauch compares many speech code policies and their enforcement to fundamentalism and former rulers who dominated by persecuting those whose ideas were different based on the rulers’ own interpretation of the truth: Islamic theocrats, Egyptian pharaohs, Chinese emperors, divine-right kings of Europe, the head priests of the Mayans, Josef Stalin and Adolf Hitler. Fundamentalist systems traditionally have been characterized as punishing or destroying people in defense of calcified ideas.28 The parallels between these systems and the speech code discussion is somewhat alarming, though perhaps extreme.

#### Universities can constitutionally place limitations on speech

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Interestingly, however, since the inception of various speech codes in American universities in the late 1980s and ‘90s6 , research suggests that campus administrators are overstepping their bounds in facilitating civil discourse and are violating the First Amendment in the process. While likely well-intentioned, university speech codes chill free speech by threatening punishment or censorship for offenses as vague as “any action that is motivated by bias”7 or as blatantly unconstitutional as a ban on “sexually, ethnically, racially, or religiously offensive messages.”8 Of course, as with all First Amendment discourse, administrators at public colleges have the ability to place time, place, and manner restrictions on some speech if the restrictions are, according to Ward v. Rock Against Racism, content neutral, narrowly tailored, serve a significant governmental interest, and leave open ample alternative channels for communication.9 For example, a protest cannot substantially restrict the day-to-day functionality of a university, wherein students prevent others from attending class or take over an administrative building.

#### No impact – the Mich policy was struck down, so too would others like it

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The first prominent speech code to be struck down in court was the University of Michigan’s “Policy on Discrimination and Discriminatory Harassment of Students in the University Environment” in the 1989 case Doe v. University of Michigan.22 Like other universities, Michigan adopted a speech code in 1988 after a series of efforts to quell and discourage racism, homophobia, sexism, and other alleged persecutions of minority groups. While on campus, students could be punished for displaying the following behaviors: 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status…. 2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation….23 An accompanying guide soon followed the policy, which provided an example of sanctionable behaviors and conduct qualifying as “harassment,” which included: 1. A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates. 2. Male students leave pornographic pictures and jokes on the desk of a female graduate student. 3. You display a confederate flag on the door of your room in the residence hall. 4. You laugh at a joke about someone in your class who stutters.24

#### Plagiarism is not protected – Ward Churchill case proves

Welch 14, Benjamin, (University of Nebraska-Lincoln) "An Examination of University Speech Codes’ Constitutionality and Their Impact on High-Level Discourse" (2014). Theses from the College of Journalism and Mass Communications. Paper 40. NP 2/22/17.

In 2007, by an 8-1 vote, the CU Board of Regents terminated Ward Churchill on the basis of plagiarism, fabrication, improper citation and falsification, after an investigative committee released a 124-page document on Churchill’s misconduct.134 The litigious journey was just beginning, for Churchill, however, and he sued the University of Colorado at Boulder for wrongful termination, arguing that he was actually being fired because of his unpopular speech. A parallel used by Churchill’s colleague asked, “If a police officer didn’t like a car’s bumper sticker, could the officer pull over the driver for speeding if the driver truly was speeding?”135 The Colorado Supreme Court upheld previous decisions that Churchill’s firing was legal and not as a result of constitutionally protected speech. In 2013, the U.S. Supreme Court denied to hear his appeal.136

A financial burden is also to be considered when dealing with First Amendment rights on campus. In the state of our litigious society, universities look to find a low-risk balance between harassment and free-speech lawsuits. Because harassment and discrimination lawsuits are much more costly than the comparatively rare First Amendment case, attorneys argue that a broad speech code may be enough to point to during litigation to prove that “offensive speech” was prohibited all along. 31 In “Higher Education?” Andrew Hacker and Claudia Dreifus affirm that colleges are society’s most sued institution after hospitals, which contributes to an overly cautious, overly regulated atmosphere hostile to free speech.32

### Friedersdorf

In January of 1987, flyers distributed anonymously at the University of Michigan declared “open season” on black people, referring to them with the most disgusting racial slurs. “Shortly thereafter,” Catherine B. Johnson noted in a law journal article, “a student disc jockey for the campus radio station allowed racist jokes to be told on-air. In response to these incidents, students at the University staged a demonstration to voice their opposition. The rally, however, was interrupted by the display of a Ku Klux Klan uniform dangling out of a nearby dormitory window.” Students in Ann Arbor were understandably upset and outraged by the racist climate created by these events. Administrators decided to respond by implementing a speech code. Thereafter, racist incidents kept occurring on campus at the same rate as before. And before the speech code was struck down 18 months later as a violation of the First Amendment, white students had charged black students with offensive speech in 20 cases. One “resulted in the punishment of a black student for using the term ‘white trash’ in conversation with a white student,” the ACLU later reported, explaining its position that “speech codes don't really serve the interests of persecuted groups. The First Amendment does.” Over the course of U.S. history, both the protections enshrined by the First Amendment and the larger ethos of free expression that pervades American culture have played a major role in every successful push that marginalized groups have made to secure civil rights, fight against prejudice, and move toward greater equality. Campus Politics Power, identity, and speech in the new American university Read more Despite that history, Jelani Cobb asserts in The New Yorker that to avoid discussions of racism, critical observers of student protests at Yale and the University of Missouri “invoke a separate principle, one with which few would disagree in the abstract—free speech, respectful participation in class—as the counterpoint to the violation of principles relating to civil rights.” The fact that race controversies “have now been subsumed in a debate over political correctness and free speech on campus—important but largely separate subjects—is proof of the self-serving deflection to which we should be accustomed at this point,” he declares. Cobb calls these supposed diversions “victim-blaming with a software update,” and positing that they are somehow having the same effect as disparaging Trayvon Martin, he cites my article “The New Intolerance of Student Activism” as his prime example. He writes as if unaware that millions of Americans believe the defense of free speech and the fight against racism to be complementary causes, and not at odds with each other. The false premises underpinning his analysis exacerbate a persistent, counterproductive gulf between the majority of those struggling against racism in the United States, who believe that First Amendment protections, rigorous public discourse, and efforts to educate empowered, resilient young people are the surest ways to a more just future, and a much smaller group that subscribes to a strain of thought most popular on college campuses. Readers, staffers, and other writers debate the campus controversies Members of this latter group may be less opposed to speech restrictions; rely more heavily on stigma, call-outs, and norm-shaping in their efforts to combat racism; purport to target “institutional" and “systemic” racism, but often insist on the urgency of policing racism that is neither systemic nor institutional, like Halloween costume choices; focus to an unusual degree on getting validation from administrators and others in positions of authority; and often seem unaware or unconvinced that others can and do share their ends while objecting to some of their means, the less rigorous parts of their jargon, and campus status-signaling. For this reason, they spend a lot of time misrepresenting and stigmatizing allies. Cobb misunderstands my motives, my body of work, and my article, which makes it doubly frustrating that he neglects to provide an outbound link to allow his readers to judge it for themselves. His erroneous assumptions render him less able to engage on this subject with millions who reject his ideology but are sympathetic to his concerns. Let me underscore how erroneous his assumptions are. His article is premised on the notion that my piece on Yale and others like one I wrote a day later on Missouri are part of a “diversion,” an attempt to avoid talking about racism through deflection. “The fault line here,” he posits, “is between those who find intolerance objectionable and those who oppose intolerance of the intolerant.” Of course, it’s far more consistent to find intolerance objectionable across the board, and to speak out against it especially when its targets have historically faced discrimination. It’s why I have written not only about recent events at Yale and Missouri, but also about Ferguson’s conspiracy against black residents; racial disparities in police killings; dangers of constructed white identity; the Campaign Zero agenda; the importance of declaring the Charleston attack to be racial terrorism; the long history of thugs attacking black churches; how video is confirming very old claims about prejudice against blacks; the brutality of police culture in Baltimore; radical experiments in converting racists; the importance of grappling with race, even imperfectly; Islamophobia and its deleterious effects; the perils of standing while Hispanic in the Bronx; the harassment of a black man tazed by a white police officer; carnage caused by drone strikes; the horrifying effects of profiling innocent Muslims, etc. Few outside a small part of the ideological left would mistake me for someone seeking to divert discourse away from racism. Moreover, my advocacy for free speech encompasses numerous articles about controversies having nothing to do with race, as well as advocacy for the First Amendment rights of people fighting racism (including high schoolers who sought to wear “I can’t breathe” t-shirts, Black Lives Matter protestors, and Muslims who sought to build a mosque near Ground Zero.) When a staunch defender of free speech in all realms, who writes about racism as often as I do in a national publication, is reflexively cast as using free speech to divert attention from racism, it suggests a charge rooted in ideological blindness, not careful observation. I hope to bridge that gap, and help everyone understand that liberals, libertarians, conservatives, and individualists alike are just as engaged in the fight against racism as the campus left, but in very different ways. We exist. Update the heuristics! Our diverse critiques of the campus left are not a sign that we care too little about fighting racism, advocating for justice, opposing prejudice, or protecting civil rights, or that we’ve yet to be enlightened by the right theorists. They are, rather, a sign that these issues, and concerns that they touch on, free speech among them, are too important to be ceded to a narrow, ideologically insular subculture as prone to blind spots, mistakes, wrongdoing, and excesses as any other; and too fond of jargon that more readily facilitates evasiveness than analytic clarity. The activist left on campus no more benefits from blanket deference than any other political movement, and their defenders should stop conflating criticism of their means and contested assumptions with opposition to or a desire to distract from widely shared ends. My articles “The New Intolerance of Student Activism” and “Campus Activists Weaponize Safe Space” evoked one critique more than any other: that activist excesses at Yale and the University of Missouri are misunderstood by outsiders who are unaware of the nuanced context of fraught race relations on those campuses. I am, however, aware of the relevant context, including the fact that most every college campus in America has some racists; that this is awful, frustrating, unjust, and disproportionately burdens minority students; that eight years ago at Yale, several students painted their faces black on Halloween; that there are plausible—though contested—allegations that a fraternity at Yale turned black students away from a party, and that many black Yalies have, periodically, confronted racist remarks; that the University of Missouri was the site of anonymous hate speech against black students, and that earlier this autumn, in the New York Times’ telling, “the president of the Missouri Student Association, who is black, reported that he was walking across campus when a group of men in a pickup truck yelled a racial epithet at him.”

Examine any cause taken up by 18-year-olds on a college campus and you’ll find ideologically diverse observers who think that they’re mistaken about various assumptions and tactics. I share the notion that young people with stories about racial injustice should be heard, and that their descriptions of their experiences are owed a degree of deference, especially by those of us who’ve never navigated college as the member of a minority group. But thoughtless or patronizing deference can be prejudicial, too; and when activist assumptions and tactics elicit intense disagreement even among members of groups victimized by the racism at issue, the notion that deference to “students of color” is even possible requires one to pretend that they constitute a monolithic group who uniformly agree. Little wonder that black, Hispanic, and Asian American collegians who depart from progressive orthodoxy often keep quiet, knowing that they’ll be called race-traitors (as one student at Yale was just called) if they are more vocal. What should be done about racist acts at Yale and and the University of Missouri? I’ll hazard some suggestions. A student who defaces a dorm with an excrement swastika should be expelled. Anonymous bigots who yell racial slurs from a pickup truck should be condemned. A frat that discriminates on the basis of race at its parties should have its charter revoked by whatever national organization conferred it. Anonymous threats should be reported to authorities; if possible, the perpetrators should be jailed; and the threatened students should be given protection by campus security. I don’t think that Cobb and I disagree about any of that. (And I have no view of whether the president at Missouri was justly removed or not. He may well have been an abject failure.) The thorniest question of all: What should be done about the fact that many black students at institutions as different as Yale and the University of Missouri feel that they inhabit campuses with racist climates where they are less welcome than others? Insofar as free speech is invoked during such controversies about racism on university campuses, it is because many leftist activists believe one necessary remedy for racism is for administrators to punish speech that they regard as problematic.

### ACLU

#### Fighting words doctrine does not apply to hate speech

ACLU N.D. American Civil Liberties Union, "Hate Speech on Campus," https://www.aclu.org/other/hate-speech-campus, accessed 2-22-2017

Q: Aren't some kinds of communication not protected under the First Amendment, like "fighting words?" A: The U.S. Supreme Court did rule in 1942, in a case called Chaplinsky v. New Hampshire, that intimidating speech directed at a specific individual in a face-to-face confrontation amounts to "fighting words," and that the person engaging in such speech can be punished if "by their very utterance [the words] inflict injury or tend to incite an immediate breach of the peace." Say, a white student stops a black student on campus and utters a racial slur. In that one-on-one confrontation, which could easily come to blows, the offending student could be disciplined under the "fighting words" doctrine for racial harassment. Over the past 50 years, however, the Court hasn't found the "fighting words" doctrine applicable in any of the hate speech cases that have come before it, since the incidents involved didn't meet the narrow criteria stated above. Ignoring that history, the folks who advocate campus speech codes try to stretch the doctrine's application to fit words or symbols that cause discomfort, offense or emotional pain.

### Banham

#### The intrinsic structure of hate speech undermines the public order

Banham 9, Gary. 11-22-2009, "Dignity and Status: Kant and Waldron," No Publication, http://kantinternational.blogspot.com/2009/11/dignity-and-status-kant-and-waldron.html, accessed 2-22-2017.NP

In the course of giving the first of his Holmes Lectures at the Harvard Law School Jeremy Waldron makes a distinction between two conceptions of dignity. He mentions on the one hand the Kantian view of dignity and on the other the one that is (or ought to be?) at issue in law and civil conduct. The distinction is presented as being that on Kant's philosophical view it follows that dignity is something inherent in each of us as human beings whilst in the law it is rather the case that dignity represents a common status that we possess but which is not merely inherent in us but rather indicative of a certain achievement. Waldron's first lecture raises a number of important issues, too many to be addressed in this posting which is why I wish merely to raise a query concerning this distinction. It appears to be based on taking the Kantian conception of dignity to reside primarily in a general picture of practical reason whilst the legal view of it that is raised by contrast is rather one that defines and describes a social standing and is hence not encoded in a general picture of practical reason. In response to this I want to raise a substantive point concerning the conception of right that Kant himself worked with. Waldron's general concern in the first lecture concerns a certain kind of defence of "hate speech" legislation on the grounds that what is at issue in it is not an "intention" in the private sense on the part of the speaker but rather an effect that is at work amongst those to whom such "speech" (normally a form of writing) is addressed. The effect that is at work is one of reducing the respect shown certain members of minority groups such that they will not be taken to have a legitimate right to equal citizenship rights. As such this kind of "speech" undercuts the sense that there is a social contract to which all have a general kind of connection with. Since this is the point of the "hate speech" in question it aims to undercut "public order" not necessarily in the sense of wishing to instigate violence but rather in that it suggests that some are not truly within the bounds of the order that has been specified as public or not there in a full sense. Waldron's general defence of "hate speech" legislation in these terms has much to commend it but does not fit well with his designation of the Kantian view of dignity as something generically distinct from the legal notion of dignity as a status and achievement. It is correct that Kant speaks of dignity in terms of his general picture of practical reason and in those terms it is presented as something of incomparable worth that we are all possessed of. However Kant's general picture of practical reason has to be related to his view of right. When we look at his view of right we find a conception of it that shows that there is Kantian precedent for the "legal" conception of dignity that Waldron speaks of. In Kant's discussion of the preliminary concepts of the "metaphysics of morals" there is a definition of personhood that determines a person as someone whose actions can be imputed to them which leads on to the sense of a person as someone subject to no other laws than those they give to themselves (autonomy). This notion is important in connection with Kant's subsequent notion of right though it is far from equivalent to it. When Kant turns to specifying the notion of right it is done in relation to a "universal law of freedom" which involves coexistence of each freedom with every other (in the universal or supreme principle of right: Ak. 6: 230). Since this coexistence requires that right be founded on mutual restraint that is based on the ground of each person's freedom then it follows that for a legal order to exist is for the status of personhood to have been given form in such an order. Hence, legal order is itself a general achievement. Kant's fuller account determines this order through notions of equality, freedom and independence (e.g. Ak 8: 290). It is true that the view of the last of these notions is problematic (and alters between the essay on theory and practice and the Metaphysics of Morals) but the notion of equality involved, as distinct from that of the freedom, is grounded in the order of the law whilst the freedom (which is recognised universally in human beings) is something that the law "restricts and realises". If we see the law as that which gives freedom its substantive content but also as something that requires equality in its nature then it follows that the Kantian view of legal dignity is one that matches the achievement sense given to it by Waldron. The "hate crime" problem that arises from being based on the attempt to either reduce the scope of public status given to a member of a group or to find a way of expelling them from that status as such does thus violate the sense of equality of each before the law. In this respect then there is congruence between the Kantian notion of dignity and the legal sense given to it by Waldron. I won't here expand further on the question of "hate crime" though the nature of it (particularly in genocide) is something that is worth consideration in terms of its boundary and limit since it does present itself as one of the ways the social contract can be breached.

### Ward

Porn’s not a violation fo right

DAVID V. WARD. Philosophical Issues in Censorship and Intellectual Freedom. https://www.ideals.illinois.edu/bitstream/handle/2142/7716/librarytrendsv39i1-2i\_opt.pdf?sequence=1

I would argue that pornography, at least that depicting the violent subordination of women, not only degrades women but men as well by depicting them as enjoying the violent subjugation of women. But this just does not entail that such pornography should be banned. A good deal of protected speech is arguably unfairly insulting or degrading or demeaning to some identifiable group or other, but, excepting the cases of literal slander and libel (in which specific individuals are identified), people have no right not to be insulted or characterized in degrading terms. The cure for such bad speech, as often pointed out, is good speech, not prohibition. In fact, elevating the undesirability of the degrading nature of pornography to the status of a right not to be degraded is a danger to the power of rights to protect legitimate human autonomy. The broader our rights claims are, whether for education, welfare, employment, housing, or freedom from the insulting nature of some pornography, the less plausible those claims are, for the more frequent their conflict with other, equally plausible rights claims. In general, claims of so-called “positive” rights, such as a “right to a job” are less plausible than those of “negative” rights, such as the right to free speech. This is because the former require that others take positive steps toward providmg the right-holder with the object of the right (in the example, a job), while “negative” rights require only that others refrain from interfering in the actions of the rights-holder. The right to free speech is the right not to have one’s speech interfered with. Requiring that other members of society not interfere with a person’s speech in no way violates or even threatens to violate their rights. However, requiring members of society to take positive action to provide a job, or education, or health care, etc., may conflict with their rights.

### Strossen

#### There can be restrictions of free speech in certain places on campus

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

The appropriate analysis is more complex than either set of general- izations assumes. In weighing the constitutional concerns of free speech, equality, and privacy that hate speech regulations implicate, deci- sionmakers must take into account the particular context within the uni- versity in which the speech occurs. For example, the Court's generalizations about the heightened protection due free speech in the academic world certainly are applicable to some campus areas, such as parks, malls, or other traditional gathering places. The generalizations, however, may not be applicable to other areas, such as students' dormi- tory rooms. These rooms constitute the students' homes. Accordingly, under established free speech tenets, students should have the right to avoid being exposed to others' expression by seeking refuge in their rooms.91

#### Viewpoint based discrimination is unconstitutional, even if it’s in places where there are captive audiences

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

Even if various areas of a university are not classified as public fo- rums, and even if occupants of such areas are designated captive audi- ences, any speech regulations in these areas still would be invalid if they discriminated on the basis of a speaker's viewpoint. Viewpoint-based dis- crimination constitutes the most egregious form of censorship104 and al- most always violates the first amendment.105 Accordingly, viewpoint discrimination is proscribed even in regulations that govern non-public forum government property?06 and regulations that protect captive audiences. 107

#### Fighting words doctrine doesn’t apply to colleges

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

Fighting Words. The fighting words doctrine is the principal model for the Stanford code, which Professor Lawrence supports.ll6 However, this doctrine provides a constitutionally shaky foundation for several reasons: it has been substantially limited in scope and may no longer be good law; even if the Supreme Court were to apply a narrowed version of the doctrine, such an application would threaten free speech principles; and, as actually implemented, the fighting words doctrine sup- presses protectible speech and entails the inherent danger of discrimina- tory application to speech by members of minority groups and dissidents. Although the Court originally defined constitutionally regulable fighting words in fairly broad terms in Chaplinsky v. New Hampshire, 117 subsequent decisions have narrowed the definition to such a point that the doctrine probably would not apply to any of the instances of campus racist speech that Professor Lawrence and others seek to regulate. As originally formulated in Chaplinsky, the fighting words doctrine ex- cluded from first amendment protection "insulting or 'fighting' words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."1"8

#### Fighting words doctrine basically has no application

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

In Gooding v. Wilson, the Court substantially narrowed Chaplin- sky's definition of fighting words by bringing that definition into line with Chaplinsky's actual holding.123 In Gooding, as well as in every subse- quent fighting words case, the Court disregarded the dictum in which the first prong of Chaplinsky's definition was set forth and treated only those words that "tend to incite an immediate breach of the peace" as fighting words. Consistent with this narrowed definition, the Court has invali- dated regulations that hold certain words to be per se proscribable and insisted that each challenged utterance be evaluated contextually.124 Thus, under the Court's current view, even facially valid laws that re- strict fighting words may be applied constitutionally only in circum- stances where their utterance almost certainly will lead to immediate violence.125 Professor Tribe described this doctrinal development as, in effect, incorporating the clear and present danger test into the fighting words doctrine.126 In accordance with its narrow construction of constitutionally per- missible prohibitions upon "fighting words," the Court has overturned every single fighting words conviction that it has reviewed since Chaplin- sky. 127 Moreover, in a subsequent decision, the Court overturned an in- junction that had been based on the very word underlying the Chaplinsky conviction. 128 For the foregoing reasons, Supreme Court Justices129 and constitu- tional scholars persuasively maintain that Chaplinsky's fighting words doctrine is no longer good law.130 More importantly, constitutional scholars have argued that this doctrine should no longer be good law, for reasons that are particularly weighty in the context of racist slurs.'3' First, as Professor Gard concluded in a comprehensive review of both Supreme Court and lower court decisions that apply the fighting words doctrine, the asserted governmental interest in preventing a breach of the peace is not logically furthered by this doctrine. He explained that: [I]t is fallacious to believe that personally abusive epithets, even if ad- dressed face-to-face to the object of the speaker's criticism, are likely to arouse the ordinary law abiding person beyond mere anger to uncon- trollable reflexive violence. Further, even if one unrealistically as- sumes that reflexive violence will result, it is unlikely that the fighting words doctrine can successfully deter such lawless conduct.132

#### Intentional infliction of emotional distress doesn’t provide grounds for protecting hate speech

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

The position that the intentional infliction of emotional distress tort should virtually never apply to words recently received support in Hus- tler Magazine v. Falwell. 159 Chief Justice Rehnquist, writing for a unani- mous Court, reversed a jury verdict which had awarded damages to the nationally-known minister, Jerry Falwell, for the intentional infliction of emotional distress. The Court held that a public figure may not "recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most."160 The Court further ruled that public figures and public officials may not recover for this tort unless they could show that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disre- gard as to whether or not it was false.161 In other words, the Court re- quired public officials or public figures who claim intention emotional distress to satisfy the same heavy burden of proof it imposes upon such individuals who bring defamation claims.162 Although the specific Falwell holding focused on public figure plain- tiffs, much of the Court's language indicated that, because of first amend- ment concerns, it would strictly construe the intentional infliction of emotional distress tort in general, even when pursued by non-public plaintiffs. For example, the Court said, to require a statement to be "out- rageous" as a prerequisite for imposing liability did not sufficiently pro- tect first amendment values. Because the "outrageousness" of the challenged statement is a typical element of the tort (it is included in the Restatement definition163) the Court's indication that it is constitution- ally suspect has ramifications beyond the sphere of public figure actions. The Court warned: "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.'64 For the reasons signalled by the unanimous Supreme Court in Falwell, any cause of action for intentional infliction of emotional distress that arises from words must be narrowly framed and strictly applied in order to satisfy first amendment dictate In addition to flouting constitutional doctrine and free speech prin- ciples, rules sanctioning group defamation are ineffective in curbing the specific class of hate speech that Professor Lawrence advocates re- straining. Even Justice Frankfurter's opinion for the narrow Beauhar- nais majority repeatedly expressed doubt about the wisdom or efficacy of group libel laws. Justice Frankfurter stressed that the Court upheld the Illinois law in question only because of judicial deference to the state legislature's judgment about the law's effectiveness.172 The concept of defamation encompasses only false statements of fact that are made without a good faith belief in their truth. Therefore, any disparaging or insulting statement would be immune from this doctrine, unless it were factual in nature, demonstrably false in content, and made in bad faith. Members of minority groups that are disparaged by an al- legedly libelous statement would hardly have their reputations or psyches enhanced by a process in which the maker of the statement sought to prove his good faith belief in its truth, and they were required to demon- strate the absence thereof. 17

#### Group defamation does not provide constitutional grounds for regulating hate speech

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

First, group defamation regulations are unconstitutional in terms of both Supreme Court doctrine and free speech principles. To be sure, the Supreme Court's only decision that expressly reviewed the issue, Beau- harnais v. Illinois, 167 upheld a group libel statute against a first amend- ment challenge. However, that 5-4 decision was issued almost forty years ago, at a relatively early point in the Court's developing free speech jurisprudence. Beauharnais is widely assumed no longer to be good law in light of the Court's subsequent speech-protective decisions on related issues, notably its holdings that strictly limit individual defamation ac- tions so as not to chill free speech.168 Statements that defame groups convey opinions or ideas on matters of public concern,169 and therefore should be protected even if those statements also injure reputations or feelings.'70 The Supreme Court re- cently reaffirmed this principle in the context of an individual defamation action, in Milkovich v. Lorain Journal Co. 171

#### Hate speech codes engender censorship and silence important discussions

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

Such incidents are not aberrational. Any anti-hate speech rule ines- capably entails some vagueness, due to the inherent imprecision of key words and concepts common to all such proposed rules. For example, most regulations employ one or more of the following terms: "demean- ing," "disparaging," "harassing," "hostile," "insulting," "intimidating," and "stigmatizing."218 Therefore, there is real danger that even a narrowly crafted rule will deter some expression that should be protected-especially in the university environment.220 In particular, such a rule probably will "add to the silence" on "gut issues" about ra- cism, sexism, and other forms of bias that already impede interracial and other intergroup dialogues.22 Additionally, it must be recognized that silencing certain expres- sions may be tantamount to silencing certain ideas.222 As the plaintiff in Doe v. Michigan argued: [T]he policy ... is an official statement that at the University of Michi- gan, some arguments will no longer be tolerated. Rather than en- courage her maturing students to question each other's beliefs on such diverse and controversial issues as the proper role of women in society, the merits of particular religions, or the moral propriety of homosexu- ality, the University has decided that it must protect its students from what it considers to be "unenlightened" ideas. In so doing, the Uni- versity has established a secular orthodoxy by implying, among other things, that homosexuality is morally acceptable, [and] that ... femi- nism [is] superior to the traditional view of women .... 223 The Michigan plaintiff was victimized directly by the "pall of ortho- doxy"224 that the University's anti-hate speech policy cast over the cam- pus. As a graduate student specializing in behavioral psychology, he felt that the rule deterred him from classroom discussion of theories that some psychological differences among racial groups and between the sexes are related to biological differences, for fear of being charged with racial or sexual harassment.225 In addition to their chilling effect on the ideas and expressions of university community members, policies that bar hate speech could en- gender broader forms of censorship. As noted by Professor William Co- hen of Stanford Law School, an anti-hate speech rule such as the one adopted by his university "purports to create a personal right to be free from involuntary exposure to any form of expression that gives certain kinds of offense." Therefore, he explains, such a rule "could become a sword to challenge assigned readings in courses, the showing of films on campus, or the message of certain speakers."2

#### Rights of minorities are dependent on the rights of bigots – protecting their speech is the only way minorities won’t be silenced

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In light of the universal condemnation of racial discrimination and the world-wide regulation of racist speech, it certainly is tempting to con- sider excepting racist speech from first amendment protection. Episodes of racist speech, such as those cited by Professor Lawrence and others, make a full commitment to free speech at times seem painful and diffi- cult. Civil libertarians find such speech abhorrent, given our dedication to eradicating racial discrimination and other forms of bigotry. But ex- perience has confirmed the truth of the indivisibility principle articulated above: History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others.262 The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have been used to protect speech proclaiming anti-racist and pro-civil libertarian messages. For example, in 1949, the ACLU de- fended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The Supreme Court agreed with that position in a decision that became a landmark in free speech history.263 Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights dem- onstrators by relying on the Terminiello d

The difficulty of formulating limited, clear definitions of prohibited hate speech, that do not encompass valuable contributions to societal dis- course, is underscored by the seemingly intractable ambiguities in vari- ous campus rules.271 **Even proponents of campus hate speech regulations recognize their inevitable ambiguities and contextualized applications**,272 with the result that the individuals who enforce them must have substan- tial discretion to draw distinctions based upon the particular facts and circumstances involved in any given case. Professor Richard Delgado, an early advocate of rules proscribing hate speech, acknowledged that the offensiveness of even such a traditionally insulting epithet as "nigger" would depend on the context in which it was uttered, since it could be a term of affection when exchanged between friends.273 The imprecise na ture of racist speech regulations is underscored further by the fact that even their proponents are unsure or disagree as to their applicability in particular situations.274 Once we acknowledge the substantial discretion that anti-hate speech rules will vest in those who enforce them, then we are ceding to the government the power to pick and choose whose words to protect and whose to punish. Such discretionary governmental power is funda- mentally antithetical to the free speech guarantee. Once the government is allowed to punish any speech based upon its content, free expression exists only for those with

#### Brown V. Board of Education does not justify restricting hate speech

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

Professor Lawrence intriguingly posits that Brown v. Board of Edu- cation, 289 Bob Jones University v. United States, 290 and other civil rights cases justify regulation of private racist speech.291 The problem with drawing an analogy between all of these cases and the subject at hand is that the cases involved either government speech, as opposed to speech by private individuals, or conduct, as opposed to speech.292 Indeed, Brown itself is distinguishable on both grounds. 1. The Speech/Conduct Distinction. First, the governmental defendant in Brown-the Topeka, Kansas Board of Education-was not simply saying that blacks are inferior. Rather, it was treating them as inferior through pervasive patterns of conduct, by maintaining systems and structures of segregated public schools. To be sure, a by-product of the challenged conduct was a message, but that message was only inci- dental. Saying that black children are unfit to attend school with whites is materially distinguishable from legally prohibiting them from doing so, despite the fact that the legal prohibition may convey the former message. Professor Lawrence's point proves too much. If incidental messages could transform conduct into speech, then the distinction between speech and conduct would disappear completely, because all conduct conveys a message. To take an extreme example, a racially motivated lynching ex- presses the murderer's hatred or contempt for his victim. But the clearly unlawful act is not protected from punishment by virtue of the incidental message it conveys. And the converse also is true. Just because the gov- ernment may suppress particular hate messages that are the by-product of unlawful conduct, it does not follow that it may suppress all hate messages. Those messages not tightly linked to conduct must still be protected.293 Professor Lawrence's argument is not advanced by his unexception- able observation that all human activity may be described both as "speech" and as "conduct." All speech entails some activity (e.g., the act of talking) and all conduct expresses some message.294 First, this fact does not justify treating any speech-conduct as unprotected; second, it does not justify eliminating protection from the particular class of speech-conduct that Professor Lawrence deems regulable. The fact that there is no clear distinction between speech and con- duct does not necessarily warrant limiting the scope of protected speech- conduct;295 instead, the lack of a clear distinction could as logically war rant expanding the scope of protection. Although one could argue-as does Professor Lawrence-that some speech is tantamount to conduct and should therefore be regulated, one could also argue that some con- duct is tantamount to speech and therefore should not be regulated. This latter approach has characterized a line of Supreme Court decisions that protect various forms of conduct, ranging from labor picketing296 to burning the American flag, as "symbolic speech.”

#### Punishment doesn’t change attitudes – it just makes hate more appealing and persuasive

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

Parts II and III of this Article emphasized the principled reasons, arising from first amendment theory, for concluding that racist speech should receive the same protection as other offensive speech. This con- clusion also is supported by pragmatic or strategic considerations con- cerning the efficacious pursuit of equality goals. Not only would rules censoring racist speech fail to reduce racial bias, but they might even undermine that goal. First, there is no persuasive psychological evidence that punishment for name-calling changes deeply held attitudes. To the contrary, psychological studies show that censored speech becomes more appealing and persuasive to many listeners merely by virtue of the censorship.358 Nor is there any empirical evidence, from the countries that do out- law racist speech, that censorship is an effective means to counter racism. For example, Great Britain began to prohibit racist defamation in 1965.359 A quarter century later, this law has had no discernible adverse impact on the National Front and other neo-Nazi groups active in Brit- ain.360 As discussed above,361 it is impossible to draw narrow regulations that precisely specify the particular words and contexts that should lead to sanctions. Fact-bound determinations are required. For this reason, authorities have great discretion in determining precisely which speakers and which words to punish. Consequently, even vicious racist epithets have gone unpunished under the British law.362 Moreover, even if actual or threatened enforcement of the law has deterred some overt racist in- sults, that enforcement has had no effect on more subtle, but nevertheless clear, signals of racism.363 Some observers believe that racism is even more pervasive in Britain than in the United States.364

#### Hate speech codes silence activists

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The first reason that laws censoring racist speech may undermine the goal of combating racism flows from the discretion such laws inevitably vest in prosecutors, judges, and the other individuals who implement them. One ironic, even tragic, result of this discretion is that members of minority groups themselves-the very people whom the law is intended to protect-are likely targets of punishment. For example, among the first individuals prosecuted under the British Race Relations Act of 1965 were black power leaders.368 Their overtly racist messages un- doubtedly expressed legitimate anger at real discrimination, yet the stat- ute drew no such fine lines, nor could any similar statute possibly do so. Rather than curbing speech offensive to minorities, this British law in- stead has been regularly used to curb the speech of blacks, trade union- ists, and anti-nuclear activists.369 In perhaps the ultimate irony, this statute, which was intended to restrain the neo-Nazi National Front, in- stead has barred expression by the Anti-Nazi League.370 The British experience is not unique. History teaches us that anti- hate speech laws regularly have been used to oppress racial and other minorities. For example, none of the anti-Semites who were responsible for arousing France against Captain Alfred Dreyfus were ever prose- cuted for group libel. But Emile Zola was prosecuted for libeling the French clergy and military in his "J'Accuse," and he had to flee to Eng- land to escape punishment.371 Additionally, closer to home, the very doctrines that Professor Lawrence invokes to justify regulating campus hate speech-for example, the fighting words doctrine, upon which he chiefly relies-are particularly threatening to the speech of racial and political minorities.372 The general lesson that rules banning hate speech will be used to punish minority group members has proven true in the specific context of campus hate speech regulations. In 1974, in a move aimed at the Na- tional Front, the British National Union of Students (NUS) adopted a resolution that representatives of "openly racist and fascist organiza- tions" were to be prevented from speaking on college campuses "by whatever means necessary (including disruption of the meeting)."373 A substantial motivation for the rule had been to stem an increase in cam- pus anti-Semitism. Ironically, however, following the United Nations' cue,374 some British students deemed Zionism a form of racism beyond the bounds of permitted discussion. Accordingly, in 1975 British students invoked the NUS resolution to disrupt speeches by Israelis and Zionists, including the Israeli ambassador to England. The intended tar- get of the NUS resolution, the National Front, applauded this result. However, the NUS itself became disenchanted by this and other unin- tended consequences of its resolution and repealed it in 1977.375 The British experience under its campus anti-hate speech rule paral- lels the experience in the United States under the one such rule that has led to a judicial decision. During the approximately one year that the University of Michigan rule was in effect, there were more than twenty cases of whites charging blacks with racist speech.376 More importantly, the only two instances in which the rule was invoked to sanction racist speech (as opposed to sexist and other forms of hate speech) involved the punishment of speech by or on behalf of black students.377 Additionally, the only student who was subjected to a full-fledged disciplinary hearing under the Michigan rule was a black student accused of homophobic and sexist expression.378 In seeking clemency from the sanctions imposed fol- lowing this hearing, the student asserted he had been singled out because of his race and his political views.379 Others who were punished for hate speech under the Michigan rule included several Jewish students accused of engaging in anti-Semitic expression380 and an Asian-American student accused of making an anti-black comment.381 Likewise, the student who recently brought a lawsuit challenging the University of Connecticut's hate speech policy, under which she had been penalized for an allegedly homophobic remark, was Asian-American.382 She claimed that, among the other students who had engaged in similar expression, she had been singled out for punishment because of her ethnic background.

#### Censorship turns bigots into martyrs, glorifying rather than undermining their beliefs.

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

A second reason why censorship of racist speech actually may subvert, rather than promote, the goal of eradicating racism is that such censorship measures often have the effect of glorifying racist speakers. Efforts at suppression result in racist speakers receiving attention and publicity which they otherwise would not have garnered. As previously noted, psychological studies reveal that whenever the government attempts to censor speech, the censored speech-for that very reason- becomes more appealing to many people.388 Still worse, when pitted against the government, racist speakers may appear as martyrs or even heroes. Advocates of hate speech regulations do not seem to realize that their own attempts to suppress speech increase public interest in the ideas they are trying to stamp out. Thus, Professor Lawrence wrongly sug- gests that the ACLU's defense of hatemongers' free speech rights "makes heroes out of bigots";389 in actuality, experience demonstrates that it is the attempt to suppress racist speech that has this effect, not the attempt to protect such speech.390

#### Regulating hate speech means it comes back in more subtle and virulent forms where it’s harder to challenge.

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

There is a third reason why laws that proscribe racist speech could well undermine goals of reducing bigotry. As Professor Lawrence rec nizes, given the overriding importance of free speech in our society, any speech regulation must be narrowly drafted.391 Therefore, it can affect only the most blatant, crudest forms of racism. The more subtle, and hence potentially more invidious, racist expressions will survive. Virtu- ally all would agree that no law could possibly eliminate all racist speech, let alone racism itself. If the marketplace of ideas cannot be trusted to winnow out the hateful, then there is no reason to believe that censorship will do so. The most it could possibly achieve would be to drive some racist thought and expression underground, where it would be more diffi- cult to respond to such speech and the underlying attitudes it expresses.392 The British experience confirms this prediction.393 The positive effect of racist speech-in terms of making society aware of and mobilizing its opposition to the evils of racism-are illus- trated by the wave of campus racist incidents now under discussion. Ugly and abominable as these expressions are, they undoubtedly have had the beneficial result of raising public consciousness about the under- lying societal problem of racism. If these expressions had been chilled by virtue of university sanctions, then it is doubtful that there would be such widespread discussion on campuses, let alone more generally, about the real problem of racism.394 Consequently, society would be less mobilized to attack this problem. Past experience confirms that the public airing of racist and other forms of hate speech catalyzes communal efforts to redress the bigotry that underlies such expression and to stave off any dis- criminatory conduct that might follow from it.3

#### Speech codes are paternalistic and ineffective and undermine solidarity

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Banning racist speech could undermine the goal of combating ra- cism for additional reasons. Some black scholars and activists maintain that an anti-racist speech policy may perpetuate a paternalistic view of minority groups, suggesting that they are incapable of defending themselves against biased expressions.396 Additionally, an anti-hate speech policy stultifies the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination. In a related vein, education, free discussion, and the airing of misunderstandings and failures of sensitivity are more likely to promote positive intergroup relations than are legal battles. The rules barring hate speech will continue to generate litigation and other forms of controversy that will exacerbate intergroup tensions. Finally, the cen- sorship approach is diversionary. It makes it easier for communities to avoid coming to grips with less convenient and more expensive, but ultimately more meaningful, approaches for combating racial discrimination

#### Here’s a 1ar advantage CP

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

In addition to the preceding measures, which could be implemented

on a society-wide basis, other measures would be especially suited to the

academic setting. First, regardless of the legal limitations on rules bar-

ring hate speech, universities should encourage members of their com-

munities voluntarily to restrain the form of their expression in light of

the feelings and concerns of various minority groups.403 Universities

could facilitate voluntary self-restraint by providing training in commu-

nications, information about diverse cultural perspectives, and other edu-

cation designed to promote intergroup understanding. Members of both

minority and majority groups should be encouraged to be mutually re-

spectful. Individuals who violate these norms of civility should not be

subject to any disciplinary action, but instead should be counseled.404

These educational efforts should be extended to members of the faculty

and administration, as well as students. Of course, universities must vigi-

lantly ensure that even voluntary limits on the manner of academic dis-

course do not chill its content

#### In order to ensure the protection of slavery, people limited freedom of speech

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

In short, although slavery coexisted with the theoretical guarantees enunciated in the first amendment, slavery did not coexist with the judicially enforceable version of those guarantees that emerged only after World War I. We never can know how much more quickly and peace- fully the anti-slavery forces might have prevailed if free speech and press, as well as other rights, had been judicially protected against violations by all levels of government earlier in our history. That robust freedoms of speech and press ultimately might have threatened slavery is suggested by southern states' passage of laws limiting these freedoms, in an effort to undermine the abolitionist cause.415

#### Success of the civil rights movement was dependent on a strong first amendment

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

The civil libertarian and judicial defense of racist speech also is based on the knowledge that censors have stifled the voices of oppressed persons and groups far more often than those of their oppressors.422 Censorship traditionally has been the tool of people who seek to subordinate minorities, not those who seek to liberate them. As Profes- sor Kalven has shown, the civil rights movement of the 1960s depended upon free speech principles.423 These principles allowed protestors to carry their messages to audiences who found such messages highly offensive and threatening to their most deeply cherished views of themselves and their way of life. Equating civil rights activists with Communists, subversives, and criminals, government officials mounted inquisitions against the NAACP, seeking compulsory disclosure of its membership lists and endangering the members' jobs and lives.424 Only strong principles of free speech and association could-and did-protect the drive for desegregation.425 Martin Luther King, Jr. wrote his historic letter from a Birmingham jail,426 but the Birmingham parade ordinance that King and other demonstrators had violated eventually was declared an unconstitu- tional invasion of their free speech rights.427 Moreover, the Civil Rights Act of 1964, which these demonstrators championed, did become law.428 The more disruptive forms of protest, which Professor Lawrence credits with having been more effective429-such as marches, sit-ins, and kneel-ins-were especially dependent on generous judicial constructions of the free speech guarantee.430 Notably, many of these protective inter- pretations initially had been formulated in cases brought on behalf of anti-civil rights demonstrators. Similarly, the insulting and often racist language that more militant black activists hurled at police officers and other government officials also was protected under the same principles and precedents.43'

#### Speech codes can not embrace complexity nor particularity

Nadine Strossen 90. Regulating Racist Speech on Campus: A Modest Proposal?. www.jstor.org/stable/pdf/1372555.pdf. Duke Law Journal, Vol. 1990, No. 3, Frontiers of Legal Thought II. The New First Amendment (Jun., 1990), pp. 484-573. Duke University School of Law. NP 2/23/17.

Some traditional civil libertarians may agree with Professor Law- rence that a university rule banning a narrowly defined class of assault- ive, harassing racist expression might comport with first amendment principles and make a symbolic contribution to the racial equality man- dated by the fourteenth amendment. However, Professor Lawrence and other members of the academic community who advocate such steps must recognize that educators have a special responsibility to avoid the danger posed by focusing on symbols that obscure the real underlying issues. The recent exploitation of the American flag as a symbol of patriot- ism, to distort the true nature of that concept, serves as a sobering re- minder of this risk. Joseph S. Murphy, Chancellor of The City University of New York, recently offered lessons for educators from the flag-related controversies. His cautionary words apply even more powerfully to the campus hate speech controversy, since the general responsibility of academics to call for an honest and direct discourse about compelling societal problems is especially great within our own communities: As educators, we should be somewhat concerned [about the manipula- tion of such symbols as the flag for partisan political purposes]. A best, we convey ideas in their full complexity, with ample appreciation of the ambiguity that attaches to most important concepts. We use symbols, but we do so to illuminate, not to obscure.... The real question is how we use our position in the university and in society to steer national discourse away from an obsessive fixation on the trivial representation of ideas, and toward a proper focus on the underlying conflicts that define our era.436 An exaggerated concern with racist speech creates a risk of elevating symbols over substance in two problematic respects. First, it may divert our attention from the causes of racism to its symptoms. Second, a focus on the hateful message conveyed by particular speech may distort our view of fundamental neutral principles applicable to our system of free expression generally. We should not let the racist veneer in which ex- pression is cloaked obscure our recognition of how important free expres- sion is and of how effectively it has advanced racial equality.

### Calleros

#### College administrators are state actors

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal.

Administrators on state campuses are state actors4 and thus are subject to the negative directive of the First Amendment 5 that government "shall make no law ... abridging the freedom of speech." 6 Although the literal meaning of the phrase "shall make no law" suggests an absolute prohibition, our system permits states to restrict certain kinds of harmful speech7 and to 8 regulate the time, place, and manner of protected speech. Nonetheless, the Supreme Court has subjected most forms of content regulation of speech to intense scrutiny, resulting in protection of even provocative speech to a degree that sets our system apart from those of other nations. 9

#### Situations in which counterspeech will be used don’t put minorities at risk//a2 delgado and yun

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal. NP 2/24/17.

First, no responsible free speech advocate argues that a target of hate speech should directly talk back to a racist speaker in circumstances that quickly could lead to a physical altercation. If one or more hateful speakers closely confronts a member of a minority group with racial epithets or other hostile remarks in circumstances that lead the target of the speech to reasonably fear for her safety, in most circumstances she should seek assistance from campus police or other administrators before "talking back." Even staunch proponents of free speech agree that such threatening speech and conduct is subject to regulation and justifies more than a purely educative response. The same would be true of Delgado's and Yun's other examples of speech conveyed in a manner that defaces another's property or 56 When offensive or hateful speech is not threatening, damaging, or impermissibly invasive and therefore may constitute protected speech, 57 education and counterspeech often will be an appropriate response. However, proponents of free speech do not contemplate that counterspeech always, or even normally, will be in the form of an immediate exchange of views between the hateful speaker and his target. Nor do they contemplate that the target should bear the full burden of the response. Instead, effective counterspeech often takes the form of letters, discussions, or demonstrations joined in by many persons and aimed at the entire campus population or a community within it. Typically, it is designed to expose the moral bankruptcy of the hateful ideas, to demonstrate the strength of opinion and numbers of those who deplore the hateful speech, and to spur members of the campus community to take voluntary, constructive action to combat hate and to remedy its ill effects. 58 Above all, it can serve to define and underscore the community of support enjoyed by the targets of the hateful speech, faith in which may have been shaken by the hateful speech. Moreover, having triggered such a reaction with their own voices, the targets of the hateful speech may well feel a sense of empowerment to compensate for the undeniable pain of the speech. 59

#### Empirically proven – there’s more effective resistance and community solidarity when purveyors of hate speech aren’t punished

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal. NP 2/24/17.

In an incident that attracted national attention, the campus community at Arizona State University ("A.S.U.") constructively and constitutionally responded to a racist poster displayed on the outside of the speaker's dormitory door in February 1991. Entitled "WORK APPLICATION," it contained a number of ostensibly employment-related questions that advanced hostile and demeaning racial stereotypes of African-Americans and Mexican-Americans. Carla Washington, one of a group of African- American women who found the poster, used her own speech to persuade a resident of the offending room voluntarily to take the poster down and allow her to photocopy it. After sending a copy of the poster to the campus newspaper along with an opinion letter deploring its racist stereotypes, she demanded action from the director of her residence hall. The director organized an immediate meeting of the dormitory residents to discuss the issues. In this meeting, I explained why the poster was protected by the First Amendment, and the women who found the poster eloquently described their pain and fears. One of the women, Nichet Smith, voiced her fear that all nonminorities on campus shared the hostile stereotypes expressed in the poster. Dozens of residents expressed their support and gave assurances that they did not share the hostile stereotypes, but they conceded that even the most tolerant among them knew little about the cultures of others and would 62 benefit greatly from multicultural education. The need for multicultural education to combat intercultural ignorance and stereotyping became the theme of a press conference and public rally organized by the student African-American Coalition leader, Rossie Turman, who opted for highly visible counterspeech despite demands from some students and staff to discipline the owner of the offending poster. The result was a series of opinion letters in the campus newspaper discussing the problem of racism, numerous workshops on race relations and free speech, and overwhelming approval in the Faculty Senate of a measure to add a course on American cultural diversity to the undergraduate breadth 63 requirement. The four women who initially confronted the racist poster were empowered by the meeting at the dormitory residence and later received awards from the local chapter of the NAACP for their activism.64 Rossie Turman was rewarded for his leadership skills two years later by becoming the first African-American elected President of Associated Students of A.S.U.,65 a student body that numbered approximately 40,000 students, only 66 2.3 percent of them African-American. Although Delgado and Yun are quite right that the African-American students should never have been burdened with the need to respond to such hateful speech, Hentoff is correct that the responses just described helped them develop a sense of self-reliance and constructive activism. Moreover, the students' counterspeech inspired a community response that lightened the students' burden and provided them with a sense of community support and empowerment. Indeed, the students received assistance from faculty and administrators, who helped organize meetings, wrote opinion letters, spoke before the Faculty Senate, or joined the students in issuing public statements at the press conference and public rally.67 Perhaps most important, campus administrators wisely refrained from disciplining the owners of the poster, thus directing public attention to the issue of racism and ensuring broad community support in denouncing the racist poster. Many members of the campus and surrounding communities might have leapt to the racist speaker's defense had the state attempted to discipline the speaker and thus had created a First Amendment issue. Instead, they remained united with the offended students because the glare of the public spotlight remained sharply focused on the racist incident without the distraction of cries of state censorship. Although the counterspeech[‘s] was not aimed primarily at influencing the hearts and minds of the residents of the offending dormitory room, its vigor in fact caught the residents by surprise. 68 It prompted at least three of them to apologize publicly and to display curiosity about a civil rights movement that they were too young to have witnessed first hand. 69 This effective use of education and counterspeech is not an isolated instance at A.S.U., but has been repeated on several occasions, albeit on smaller scales.7° One year after the counterspeech at A.S.U., Stanford University responded similarly to homophobic speech. In that case, a first-year law student sought to attract disciplinary proceedings and thus gain First Amendment martyrdom by shouting hateful homophobic statements about a dormitory staff member. The dean of students stated that the speaker was not subject to discipline under Stanford's code of conduct but called on the university community to speak out on the issue, triggering an avalanche of counterspeech. Students, staff, faculty, and administrators expressed their opinions in letters to the campus newspaper, in comments on a poster board at the law school, in a published petition signed by 400 members of the law school community disassociating the law school from the speaker's epithets, and in a letter written by several law students reporting the incident to a prospective employer of the offending student.71 The purveyor of hate speech indeed had made a point about the power of speech, just not the one he had intended. He had welcomed disciplinary sanctions as a form of empowerment, but the Stanford community was alert enough to catch his verbal hardball and throw it back with ten times the force. Thus, the argument that counterspeech is preferable to state suppression of offensive speech is stronger and more fully supported by experience than is conceded by Delgado and Yun. In both of the cases described above, the targets of hateful speech were supported by a community united against bigotry. The community avoided splitting into factions because the universities eliminated the issue of censorship by quickly announcing that the hateful speakers were protected from disciplinary retaliation. Indeed, the counterspeech against the bigotry was so powerful in each case that it underscored the need for top administrators to develop standards for, and some limitations on, their participation in such partisan speech. 72 Of course, the community action in these cases was effective and empowering precisely because a community against bigotry existed. At A.S.U. and Stanford, as at most universities, the overwhelming majority of students, faculty, and staff are persons of tolerance and good will who deplore at least the clearest forms of bigotry and are ready to speak out against intolerance when it is isolated as an issue rather than diluted in muddied waters along with concerns of censorship. Just as the nonviolent demonstrations of Martin Luther King, Jr., depended partly for their success on the consciences of the national and international audiences monitoring the fire hoses and attack dogs on their television sets and in the print media,73 the empowerment of the targets of hateful speech rests partly in the hands of members of the campus community who sympathize with them. One can hope that the counterspeech and educational measures used with success at A.S.U. and Stanford stand a good chance of preserving an atmosphere of civility in intellectual inquiry at any campus community in which compassionate, open minds predominate.

#### Minorities want free speech – it’s key to effective resistance

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal. NP 2/24/17.

The first example shows how several outspoken African-American students benefitted from the atmosphere of free speech and counterspeech at A.S.U. after the racist poster incident described in part A above. Vernard Bonner, the African-American leader of Students Against Racism, vented his outrage over the racist poster with an opinion letter that some complained reflected racist stereotyping of whites. 83 Although his own speech was offensive to some and sparked criticism, he was secure in his right to speak his mind without fear of censorship or discipline. Similarly, one year after he led the counterspeech to the racist poster and a year before being elected student body president, Rossie Turman reaffirmed his support for A.S.U.'s policies supporting free speech, precisely because those policies protected his right to strongly express his own views.84 In the same year, a militant African-American student, Ashahed Triche, expressed his more radical views on race relations in a regular column of the campus newspaper, regularly offending white readers. Though some of the offended readers engaged in their own counterspeech and even recommended that the newspaper drop his column, 85 he continued to express his provocative views free from censorship. A campus policy that prohibited offensive, racially hostile speech presumably would have bottled up these emerging African-American speakers along with their white counterparts.86 Perhaps the result of such a policy would be a kinder, gentler campus, but these African-American students were willing to sacrifice subtlety in their speech to draw attention to their perspectives. 8 A second example illustrates the pain and frustration that accompany a failure to address minority offensive speech creatively and constructively. With the permission of the university administration, the Student Union Governing Board of San Francisco State University awarded a local artist $1,500 to paint a mural on the side of the Student Union building. In commemoration of what would have been Malcolm X's sixty-ninth birthday, the ten-foot-square mural depicted Malcolm X, along with Stars of David near dollar signs, a skull and crossbones, and the words "African Blood." Many Jewish and other members of the campus community understandably regarded the mural as outrageously anti-Semitic and further evidence that multiculturalism on campus had not embraced the Jewish community. The artist and many students, including African-Americans, denied that the mural was intended to offend Jewish students; instead, they argued that it expressed a legitimate political message and had historical significance as a representation of Malcolm X's early views. On orders of the university president, workers painted over the mural, but only after dozens of riot police held back supporters of the mural, some of them weeping over the destruction of the artwork.

#### Hate speech is a wakeup call that lets colleges create more effective movements to resolve the route cause of prejudice

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal. NP 2/24/17.

For example, in the case described in part B above of the racist poster at A.S.U., the campus community used the racist poster as a "wake-up call" about the need for multicultural diversity. °2 In initial discussions about the poster, students concluded that it reflected fear and ignorance and that it revealed a general gap in the education of many students. The need for multicultural education consequently became a theme of the campus counterspeech, which in turn helped to persuade the Faculty Senate to include a course in American diversity as part of the undergraduate breadth requirement. Had the dormitory banned racially offensive posters, the speaker might have been deterred from revealing his bigotry, or a staff member might have removed the poster before it was found by the four African-American women who exposed it to the entire campus community. The lesson of the poster was a painful one, but the campus community learned from it and acted on it. The campus affirmatively used the hateful speech to underscore the need for multicultural education, a truth that was underscored by its collision with the error of hostile racial stereotyping. Moreover, the campus was successful in its educational response precisely because it kept public attention focused on the problem of bigotry and ignorance; it did this by avoiding any action that would raise a competing issue regarding protection of speech.

#### Exposure of bigotry through speech is key to safety – students should know who to avoid

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal. NP 2/24/17.

In my discussions of this event with students, I have suggested that the poster, though offensive to many, served an important educative purpose: it warned other residents of the dormitory about the apparent values of the person engaging in the display. If a student objectified women to such a degree that he displayed a female pinup on the outside of his door, the most conspicuous forum from which to exclaim his identity to every passerby, one could reasonably wonder-and a group discussion at the dormitory could examine-whether he was likely to display any respect for the autonomy of women who visited his room. The display on his door arguably served as a warning to women on his floor: "Until you learn more about this person, enter at your own risk and with your guard up." A rule prohibiting such a display might have deterred him from revealing his values, thus depriving a trusting visitor of valuable information or a residence hall advisor of the incentive to secure assurances of proper behavior from him. 107 In sum, bigotry or the potential for discrimination is sometimes best revealed. On the other hand, the information value of speech that warns of a speaker's bigotry is not so great that a campus would affirmatively encourage its bigoted students to reveal their most hostile feelings at every turn. As discussed in part IV below, A.S.U. addresses hateful speech partly through educational efforts that encourage all members of campus to avoid hostile speech and to discuss the controversial issues of the day in a civil, intellectual manner befitting an institution of higher learning.

#### It’s less paternalistic to give students greater responsibility to effectively confront hate

Calleros 95. Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun. Charles R. Calleros (Professor of Law, Arizona State University). 1995. Arizona State Law Journal. NP 2/24/17.

It takes a more courageous administrator to candidly inform the complaining students about First Amendment principles and to prepare them for the chess match of wits with a speaker who seeks or is thrust into First Amendment martyrdom. 116 With the proper advice and support, the students can shift from faith in the illusory power of sanctions to the real potential for empowerment if they can engage in meaningful counterspeech and can secure the alliance of the larger university community. That is arguably a more demanding task for students and administrators, but it can be exhilarating, empowering, and much more likely to lead to success.

### Herron

#### Speech codes can not enable virtuous behavior – virtue can not be enforced

Herron 93, Vince. (Class of 1994, University of Southern California Law Center. B.A. 1990, University of California, Los Angeles) 67 S. Cal. L. Rev. 407 (1993-1994). Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth, Herron, Vince. NP 2/24/17.

Addressing the intolerance that breeds hate speech, one critic comments, "Suppressing objectionable speech solves nothing. Suppressing racist speech will not eliminate racism. Suppressing sexist speech will not abolish sexism. [And] suppressing anti-gay speech will not eradicate homophobia.' 5 7 As for enlightening the ignorant who make comments either because they mistakenly believe in group superiority or are unaware of the damage that innocent comments can create, the same scholar notes, "Students bring to college their prejudices, their fears, their doubts, their misconceptions. If they spend four years cooped up under repressive regulations, they might dutifully obey the rules, offend no one, enjoy [politically correct] acceptance and leave with their prejudices, fears, doubts and misconceptions firmly intact. 5 1 8 Another author, demonstrating that codes do not attack the problem at its core, makes a distinction between manners and virtue.5 9 She comments that while manners can be coerced, compelling a person to act virtuously will not create a virtuous person.60 Enforcing virtuous behavior will not lead to internalization of the underlying moral beliefs upon which speech codes are grounded. John Locke once said that it is "[o]ne thing to press with arguments, another with penalties. '' 61 Abraham Lincoln agreed that if a man is shunned "he will retreat within himself, close all the avenues to his head and his heart." 62 Speech codes that force students to act virtuously, but fail to instill in the students the virtues upon which the codes are grounded, will do little to combat the real problems and thus are destined to fail.

#### Speech codes exacerbate tensions and increase use of forbidden speech

Herron 93, Vince. (Class of 1994, University of Southern California Law Center. B.A. 1990, University of California, Los Angeles) 67 S. Cal. L. Rev. 407 (1993-1994). Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth, Herron, Vince. NP 2/24/17.

Even if it is true that administrators are so short-sighted, there is some evidence that speech codes actually serve to exacerbate already strained tensions on campuses. Dominant groups, which consider codes to be abridgements of free expression created to solve a problem reported only by minority groups (a problem whose gravity the dominant group does not recognize or understand), may struggle to accept the restrictions. Also, both dominant and minority group members alike have been and will be sanctioned by university administrators under these codes that, doubtless, "exacerbate tensions among members of these groups." 66 It has also been suggested that censoring certain expression makes the expression more, rather than less, attractive. 67 This leads to increased, not decreased, use of this expression, and, therefore, more injury, not less. Speech code proponents may disagree with the proffered evidence and dispute that the codes actually exacerbate tensions. They may continue to assert that speech codes in fact benefit minority group members by protecting them from injurious speech. But even if this assertion is accepted, these modest gains will be short-lived and are far outweighed by what both minority group members and educational environments sacrifice when speech codes are established and enforced.

#### Speech codes exacerbate the route cause of bias and give bigots power

Herron 93, Vince. (Class of 1994, University of Southern California Law Center. B.A. 1990, University of California, Los Angeles) 67 S. Cal. L. Rev. 407 (1993-1994). Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth, Herron, Vince. Pg 423-424.NP 2/24/17.

Codes not only fail to end the racism, sexism, and homophobia which lead to hate speech, but may actually retard the process. Besides failing to challenge the root problems of ignorance and intolerance, university speech codes exacerbate the problem by masking these causes of hate speech. "[S]uppression of expression conceals the real problems confronting a society and diverts public attention from the critical issues.' '68 When ignorance and intolerance are suppressed but not eliminated, these root problems are less visible to the university community. It follows that when the university community is unable to discern the ill, they are unable to act to reverse the causes and the healing process is retarded. Speech-regulating rules may force campus members to act in a more proper and egalitarian manner when other members are watching.6 9 However, they will not change the members' true feeling toward other groups in the campus society. Campus speech codes in fact force community members to hide their true -views to avoid sanction. But this effectively forces campus members in need of rehabilitation to mask and disguise that need. This effect in turn frustrates and impedes the university's ability to facilitate the reformation. Thus those members of the campus who hold ignorant or intolerant views may pass through the university system and into the rest of their lives with their erroneous views undetected by those who had a chance to correct them. As mentioned earlier in Part III.A, university members who are required to filter their expression through the requirements of a speech code may garner some knowledge as to their own insensitivities. Members who had the potential to engage in hate speech not because they were intolerant, but because they were unaware that their speech caused injury, will be able to begin their own rehabilitation through self-governance. But not all speakers will be able to rehabilitate on their own. Those speakers who continue to misunderstand their unawareness will not get the outside guidance they need to understand. Also it is safe to assume that there will be no self-governance by those who hold hateful ideas and prejudice. These speakers will, under the pressures of speech codes, feel restrained from exhibiting their feelings and this will effectively prevent their identification as bigots in need of rehabilitation. Suppression of the bigotry which leads to hate speech may also drive the ideas underground, allowing them to take on a life of their own unbeknownst to, and therefore unchallenged by, the rest of the university community. The rules that force these members underground may actually serve to strengthen and highlight their sense of grievance and even create martyrs.70 Those who are driven underground are able to attract new followers by holding themselves out to be an "oppressed minority" in their own right, "whose 'truths' are so powerful that they are banned by the Establishment. ' 71 These "truths" are presented to potential followers unopposed, because those who would oppose these ideologies do not know they exist, or, without any reminder of the need for opposition, have become apathetic. Sweeping the problem under the rug is not the answer and will do little to solve the problem. Keeping the problem in the public spotlight, where community members are aware of it, enables members to attack it when it surfaces. Katharine Bartlett and Jean O'Barr stated, "If there is a silver lining to the blatant, egregious forms of hateful harassment that Lawrence describes, it is that they help to make the underlying forms of prejudice undeniable."'72 The gains in injury prevention garnered by campus speech codes are gained at the expense of the community's ability to recognize the ideologies which originally led to these injuries and hinders the continued fight against those ideologies.

#### Speech codes undermine academic freedom

Herron 93, Vince. (Class of 1994, University of Southern California Law Center. B.A. 1990, University of California, Los Angeles) 67 S. Cal. L. Rev. 407 (1993-1994). Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth, Herron, Vince. Pg 423-424.NP 2/24/17.

By reducing speech at the university by eliminating from the marketplace certain ideas which university administrators feel are unacceptable, speech codes also threaten the academic process. Speech codes which inhibit the free exchange of ideas trample on the very canons upon which universities are founded. Although the ideas that may be expressed when no speech code exists may be repugnant, the university is simply not a place where ideas and expression should be suppressed.73 When speech codes exist, "[n]ot only are the delicate, vital values of free speech seriously jeopardized, but suppression inevitably creates a climate of thought control, a habit of censorship and an atmosphere of reactionary conformity... ."I "[T]he main purpose of a university is the search for knowledge .... For that reason, any coercive curtailment of unpopular viewpoints... is inconsistent with the very foundation of a university education."7 5 The university especially is a marketplace of ideas and should be a bastion of unrestricted free speech.76 "[O]nce you start telling people what they can't say, you will end up telling them what they can't think."77 This obstruction of both academic freedom and the freedom to express all ideas threatens grave damage to the educational process and is a price which is far too high to pay for the modest, short-term gains garnered by speech codes.

#### Censorship undermines ability of students to critically analyze their own ideas

Herron 93, Vince. (Class of 1994, University of Southern California Law Center. B.A. 1990, University of California, Los Angeles) 67 S. Cal. L. Rev. 407 (1993-1994). Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth, Herron, Vince. Pg 423-424.NP 2/24/17.

In sum, speech codes reduce the amount of speech in universities by censoring certain, albeit offensive, ideas from the marketplace. Censorship of "unacceptable" ideas will lessen student exposure to the totality of ideas in the marketplace. But the problem of censorship goes beyond that; it is possible that overzealous administrators may inadvertently censor from the marketplace ideas that are true, or which contain some truth, but that incidentally cause psychological injury. Even if administrators restrained themselves and codes were promulgated that authorized all ideas that offered any educational benefit to the campus, it is likely that these codes would still deter students and faculty from airing certain authorized, yet controversial or unpopular, ideas. Students and faculty will abstain from speaking when they are unsure that the ideas are "safe." These limits on speech within the university interfere with the academic process, the first purpose of the university. It is the mission of the university to facilitate students' discovery of truth. Truth is best discovered when all ideas are voiced and freely analyzed.113 Discussion must be open to all ideas, no matter how true or false these ideas are perceived to be. Many widely held beliefs have turned out to be wrong," 4 and many discarded beliefs have turned out or to have held at least a kernel of validity.' 15 Professor Emerson argued that "through the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions. .... "I Speech codes that prohibit certain expression or thoughts from everyday discussion and consideration prevent that kind of toleration, testing, and rethinking. "The soundest and most rational judgment is arrived at by considering all facts and arguments that can be put forth in behalf of and against a proposition." 1 7 It is especially important for the seeker of truth to hear arguments put forth by those who feel strongly for one side or the other and who argue most aggressively for their side." 8 Suppressing the free exchange of ideas associated with academic process impedes and hinders that pursuit. Preventing acceptable and unacceptable ideas from entering the marketplace obstructs the ascertainment of truth. These arguments hold even more weight in the context of the university, whose mission is to facilitate the pursuit of truth by its members. Students in particular not only need the ability to voice their own ideas and question the propositions of others; they also need to be exposed to all contentions and to become able to decide for themselves which assertions are true and which are not. The proposition that students need to hear all sides of an argument to arrive at a legitimate conclusion necessitates that other students and faculty need to be able to present and address all sides. "[A]ny curtailing of the teacher's freedom of thought or of expression reacts on the attitude of the students.""' 9 The freedom to do this is the ability to learn and to think and is the freedom the student particularly needs.120 "[A]n essential part of an education is to learn to demystify language, to strip it of its ability to demonize and stigmatize .... , 12 A true education should enable the student to recognize prejudice and bigotry and leave the student intolerant of intolerance. The true education will facilitate the ability of the student to refute such propaganda, 22 for "[t]he University is not engaged in making ideas safe for students. It is engaged in making students safe for ideas."'1 3 Speech codes which inhibit the free exchange of ideas and obstruct the pursuit of truth harm the university in two ways. The first injury inflicted on the university is that students are denied a complete education. They are precluded from learning certain truths which make up the sphere of knowledge and scholarship. John Stuart Mill suggested that the creation of knowledge "is the most precious gift that a man can bestow on mankind."' 1 4 Speech codes frustrate that gift. This frustration leads to the second injury to the university. Speech suppression dulls the attack on the roots of damaging expression. Damaging expression is born of either ignorance or intolerance. The ignorant are often unaware that their speech is harmful while bigots often premise their intolerance on false biases and beliefs about inferiority. The ascertainment of truth and knowledge does much to remedy both of these causes but speech codes inhibit that remedy.

### Cotler

Cotler, Irwin. PRINCIPLES AND PERSPECTIVES ON HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION: THE CANADIAN EXPERIENCE AS A CASE-STUDY IN STRIKING A BALANCE. Chapter 13.

### Post

#### Constitution = hard to interpret//spec offense?

Post 91. Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267 (1991), <http://scholarship.law.wm.edu/wmlr/vol32/iss2/4>. NP 2/28/17.

As any constitutional lawyer knows, first amendment doctrine is neither clear nor logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections. It requires determined interpretive effort to derive a useful set of constitutional principles by which to evaluate regulations of expression. In recent years there has been an unfortunate tendency, by no means limited to the controversy surrounding racist speech, to avoid this difficult work by relying instead on formulaic invocations of first amendment "interests" which can be captured in such conclusory labels as "individual self-fulfillment," "truth," "democracy," and so forth.m These formulas cast an illusion of stability and order over first amendment jurisprudence, an ilusion that can turn dangerous when it substitutes for serious engagement with the question of why we really care about protecting freedom of expression.

Post 91. Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267 (1991), <http://scholarship.law.wm.edu/wmlr/vol32/iss2/4>. NP 2/28/17.

The contemporary debate nevertheless contains three distinct

arguments that racist ideas ought to be proscribed because of

their "deontic" harm. The first is that the idea of racism is "sui

generis" because it is "universally condemned."1 The same authors

who make this claim, however, also stress "the structural

reality of racism in America," a reality manifested not merely in

an "epidemic of racist incidents," but also in the widespread

racist beliefs characteristic of "upper-class whites" and important

social "institutions."'24 In fact it is probably fair to characterize

these authors as proponents of regulating racist speech precisely

because of their urgent sense of the prevalewe of racist practices.

Although the nightmare of these practices ought to occasion

strong public response, their prevalence substantially undermines

the conclusion that racism is "universally condemned" 1

25 in any

sense relevant for first amendment analysis. Such practices can

be understood only as manifestations of strongly held but otherwise

unarticulated racist ideas. 12 6

A second argument is that the failure to regulate racist ideas

amounts to a symbolic endorsement of racist speech, which is

intolerable in "a society committed to ideals of social and political

equality."'1 In essence this argument rejects the public/private distinction required by democratic self-governance. 128 But if responsibility

for ideas advanced by individuals in public discourse

were to be attributed to government, the government could not

then also be deemed responsive to those ideas in the way required

by the principle of self-determination. Just as a library could not

function if it were understood as endorsing the views of the

authors whose books it collects and displays, so also in a democracy

the government could not serve the value of autonomy if it

were understood as endorsing the ideas expressed by private

persons in public discourse. 129

A third argument is that the free expression of racist ideas is

inconsistent with our commitment to the egalitarian ideals of the

fourteenth amendment. At root this argument rejects autonomy

as the principal value of democracy and substitutes instead what

Kenneth Karst has eloquently argued is "the substantive center

of the fourteenth amendment: the principle of equal citizenship."

130 Although some political theorists have endorsed this

position,' 31 it runs against the overwhelming American commitment

to the importance of "self-rule," to the fundamental belief

"that the American people are politically free insomuch as they

are governed by themselves collectively."'3 2

#### Group defamation doesn’t make sense in American law

Post 91. Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267 (1991), <http://scholarship.law.wm.edu/wmlr/vol32/iss2/4>. NP 3/11/17.

In American law, by contrast, there is a tendency to view

groups as mere "collections of individuals,' ' 140 whose claims are

no greater than those of their constituent members.' 4 ' This tendency

is virtually fixed by the individualist presuppositions of

public discourse. Thus in Cantwell v. Connecticut42 the Court

extended first amendment protection to an anti-Catholic diatribe

so violent that it "would offend not only persons of that persuasion,

but all others who respect the honestly held religious faith

of their fellows."'4 3 The Court reasoned that this constitutional

immunity was necessary so that "many types of life, character,

opinion and belief can develop unmolested and unobstructed."' 44

This reasoning presupposes that groups evolve through the informed

choices of individuals. 145 The Ciurt subordinated the sensibilities of members of established groups, such as Catholics, to

the communicative structure necessary for these choices. 146 It

thus refused to allow unattractive and highly offensive representations

of the Church to be excluded from public discourse.

#### Group harm should not be the basis for regulation of speech – it creates static conceptions of group identity constructed by the majority that disempowers minorities and undermines democratic principles and deliberation.

Post 91. Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267 (1991), <http://scholarship.law.wm.edu/wmlr/vol32/iss2/4>. NP 3/11/17.

The same logic, I believe, holds true for racial groups. We must distinguish race as a biological category from race as a social category. Even if unfortunately "the attempt to establish a biological basis of race has not been swept into the dustbin of history,"' 54 it would nevertheless be deplorable to construct first amendment principles on the basis of a biological view of race. What is most saliently at issue is rather "race as a social concept": "The effort must be made to understand race as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle."'55 To the extent that the social meaning of race is thus profoundly controversial156 - and it is controversial not merely for members of minority groups but also for the entire Nation 57 - the individualist premises of public discourse will ensure that it remains open to democratic constitution. This lack of closure may of course be threatening, for it casts the creation of group identity upon the uncertain currents of public discourse. The safe harbor of legal regulation may, by contrast, appear to promise members of minority groups more secure control over the meaning of their social experience. But that promise is illusory, for it is profoundly inconsistent with the analysis of racism prevalent in the contemporary literature. To the extent that racism is viewed as pervasive among whites, and to the extent that whites, as a dominant group, can be expected to hold the levers of legal power, there would seem little reason to trust the law to establish socially acceptable meanings for race. Such meanings cannot be determined by reference to easy or bright-line distinctions, as for example those between positive or negative ascriptions of group identity. The work of figures as diverse as William Julius Wilson,es Shelby Steele,159 and Louis Farrakhan160 illustrates how highly critical characterizations of racial groups can nevertheless serve constructive social purposes. To vest in an essentially white legal establishment the power to discriminate authoritatively among such characterizations and purposes would seem certain to be disempowering. 16 The conclusion that group harm ought not to justify legal regulation is reflected in technical first amendment doctrine in the fact that virtually all communications likely to provoke a claim of group harm will be privileged as assertions of evaluative opinion. 162 The following language, for example, gave rise to legal liability in Beauharnais: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL."'163 Justice Frankfurter interpreted this language as a false factual assertion: "No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana."' 164 This interpretation, however, seems plainly incorrect. To accuse an individual of using marijuana is to assert that she has committed certain specific acts, but to accuse the group "blacks" of using marijuana is not to make an analogous assertion. Some blacks will have used marijuana, and most will not have. The question is thus not the existence of certain specific acts, but rather whether those acts can appropriately be used to characterize the group. The fundamental issue is the nature of the group's identity, an issue that almost certainly ought to be characterized as one of evaluative opinion. Because the social meaning of race is inherently controversial, most statements likely to give rise to actions for group harm will be negative assessments of the identity of racial groups, and hence statements of evaluative opinion. No serious commentator would advocate a trial to determine the truth or falsity of such statements; the point is rather that such statements should not be made at all because of the deep injury they cause. But in a context in which group identity is a matter for determination through political struggle and disagreement, the hypostatized injury of a group cannot, consistent with the processes that instantiate the principle of self-determination, be grounds to legally silence characterizations of group identity within public discourse.

### O’Hagan

#### Yiannopoulos proves – the alt-right’s defense of free speech is a ploy to push their values into the mainstream – anger stems from rejection of racism, not censorship. Permitting bigoted speech only legitimizes the alt-right and their views.

Ellie Mae O'Hagan 2-27, 2-27-2017, "The ‘free speech debate’ is nothing of the sort, whatever the far right says," Guardian, https://www.theguardian.com/commentisfree/2017/feb/27/free-speech-debate-milo-yiannopoulos-alt-right-censorship, accessed 3-7-2017. NP

What do these two incidences tell us about the infernal free speech debate? They tell us that it isn’t really a debate about free speech at all; it’s a debate about acceptable speech. Apparently Yiannopoulos could go on to have a glittering career after calling an ex-employee “a common prostitute” and threatening to blackmail her after she complained about unpaid wages. Apparently it’s fine for someone like him to occupy a considerable public platform after he encouraged the racist and misogynistic targeting of actor Leslie Jones. Public figures who insisted on Yiannopoulos’s right to free speech after all these incidences, but not after he appeared to condone paedophilia, aren’t making a statement about liberal values; they are simply revealing what they themselves are willing to tolerate. His demise reveals that at the end of the day we all believe there should be limits to freedom of speech. The only difference between us is where we draw the line. Moreover, the pint-sized moral panic over a single seminar at the University of Sussex suggests that – for the right – freedom of speech only travels in one direction. As soon as anyone dissents from their enforced values and behaviour, all hell breaks loose. Remember when the right lost its mind because Jeremy Corbyn’s bow on Remembrance Day was deemed insufficiently dramatic? Or consider the traditional national angst over the possibility that some local authorities might use the word “Winterval” instead of “Christmas”. H If we were genuinely debating freedom of speech, and not in fact having an ideological battle over the values that define our public sphere, quite a few of Yiannopoulos’s defenders would probably have defended Corbyn and Winterval too. They certainly wouldn’t now be reaching for the smelling salts because 10 people at the University of Sussex decided to talk about rightwing views one lunchtime. The rise and fall of Milo Yiannopoulos – how a shallow actor played the bad guy for money Read more What is happening here is threefold: first, the right is so accustomed to its values dominating public discourse that many people within it have become grown-up babies who can’t bear to live in a society that isn’t constantly pandering to their sensitivities (what the writer Arwa Mahdawi describes as “populist correctness”). Second, others on the right are shrewdly exploiting the important principle of freedom of speech to ensure their ideas are the prevailing ones in society, by claiming any challenge to them as oppression. And finally, these groups are being aided and abetted by liberal dupes and cowardly university institutions, both of which are convinced that they’re engaged in an impartial debate about enlightenment values that isn’t actually taking place. Enough is enough. The insistence that we exist in some kind of neutral marketplace of ideas has led to a situation where deeply ideological positions can be put forward without any moral value being ascribed to them. “The most marginalised position in public discourse today is ‘good things are good and bad things are bad’,” as academic philosopher Tom Whyman puts it. Sexism and racism are, in fact, worse than equality – and public figures and institutions should not retreat into the belief that acknowledging as much amounts to some sort of discrimination. If we are going to have a debate, let’s debate what kind of society we want to build and what kind of values we want to live by. Let’s be clear that bigotry is intolerable. Because the Milo Yiannopouloses of this world know exactly what they’re doing – the only ones equivocating are us.

### Post 1

**Only through speech regulations contrary to the first amendment can educational institutions fulfill their purpose and promote academic freedom – dissent is only possible through limitations imposed by professors**  
Hyde-Keller summarizes and quotes Post 14, O'rya. Robert C. Post on why speech at universities must be regulated. November 14, 2016. https://news.brown.edu/articles/2016/11/post

Legal scholar argues that free speech, as defined by the First Amendment, would prevent universities from fulfilling their dual missions of research and teaching. PROVIDENCE, R.I. [Brown University] — In accordance with society’s understanding of higher education’s mission of research and teaching, speech must be regulated at universities — and that regulation of speech is in fact fundamentally necessary for achieving the purpose of a university, argued Robert C. Post in a lecture at Brown University titled “Freedom of Speech in the University.” Post, a renowned legal scholar and dean of Yale Law School, spoke on Monday, Nov. 14, in the Watson Institute for International and Public Affairs as part of Brown’s “Reaffirming University Values: Campus Dialogue and Discourse” series, co-sponsored by the offices of the president and provost. “There are different kinds of freedoms that are related to the two different kinds of missions of a modern university — research on the one hand, teaching on the other,” he said. “But in either case, these freedoms are conceptually distinct from the kind of freedom of speech that derives from the political arena, where all are equal and all have to exist for the end of self-governance. The university is not about self-governance. The university is about the attainment of education and the attainment of knowledge.” VIDEO: "Freedom of Speech in the University" To frame his argument, Post first defined three basic rules governing freedom of speech as outlined in the First Amendment to the U.S. Constitution and defined by the Supreme Court: first, the state can’t tell a speaker that they have to speak about any particular content; second, there are no true or false opinions and all ideas are equal; and third, the state cannot compel a person to speak. He then defined the mission of most universities as being primarily two things — research, or the discovery and advancement of knowledge; and teaching, the conveying of knowledge. In order to advance these two goals, he said, universities cannot and should not follow these three basic rules of freedom of speech. Research, Post said, is ultimately based in the notion that not everyone has equal knowledge of a given topic and that expert knowledge is created through disciplinary study. “When we are talking about university research and expanding knowledge, it is resting on a disciplinary hierarchy, which is exactly opposite of the democratic equality on which freedom of speech rests,” he said. Therefore, in order to perform research and to advance it, he said, universities must discriminate on content, make judgments that some ideas are better than others and compel professors and researchers to speak in order to communicate their knowledge. Though these actions further the mission of a university, he said, they violate the rules of the First Amendment. Similarly, he said, a classroom is a place in which professors must choose specific content types to teach, ignoring others; judge the quality of student ideas; compel students to speak about what they’ve learned; and regulate speech so that the environmental is a respectful and productive one. “Any teacher knows that students who are threatened or assaulted don’t listen,” he said. “They don’t learn. So you have to create the conditions under which learning is possible, and you have to regulate the speech in order to advance that goal.” Again, he said, these requirements of good teaching and learning necessarily violate the rules of the First Amendment. Post went on to differentiate between freedom of speech and academic freedom, which he argued is crucial to the mission of universities, quoting the 1915 Declaration of Principles on Academic Freedom and Academic Tenure by the American Association of University Professors: “Academic freedom upholds not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession.” He argued that academic dissent is absolutely necessary, but that people must first be literate within the academic discipline in which they are voicing dissent — and then dissent in a way that is intelligible to people who already know the discipline. “Disciplines are committed to progress, which means they must have dissent, but unlike classic principles of freedom of speech, they don’t have only dissent — they have dissent that is constantly evaluated by the rules already existing within the community of knowledge that constitutes the disciplines,” he said. “Disciplines that do not encourage internal criticism risk atrophy and death. But disciplines that do not evaluate according to standards of competence risk disintegration and incoherence. That’s the paradox that any discipline lives in. That’s the paradox that the university lives in.”

### Friedler

#### This guy liked frats

Friedler 15. Jake Friedler (Stanford ’15, Comp Literature Major), 3-22-2015, "In Defense of Fraternity," Stanford Arts Review, http://stanfordartsreview.com/in-defense-of-fraternity/, accessed 3-9-2017. NP

These years have taught me that men are not inherently problematic. Living at TDX has afforded me the strange opportunity to experiment with masculinity while coming to terms with my queer sexuality and gender performance. It hasn’t always been easy, but it has been very rewarding. I have learned that I actually like chugging beer. I have learned that a bro-tank is really the only comfortable option in the spring, just as I have learned that my long hair is best worn in bows and braids. I have learned that there’s a time for trap and a time for Beyoncé (but there’s always time for both). I have learned to be a man in a very queer manner. I wish there was a way to get more people like me in TDX without the need for them to sneak in, as I did, by Trojan horse; that queer guys and even women could enjoy the benefits of membership without being asked to cloak themselves in the trappings of masculinity. Beneath the bro-tanks and the braids, we are all just people, essentially undetermined. Perhaps if we could come to terms with that, we wouldn’t need to patrol the borders of our identities by appending “bro” (or “dude” or “man”) to the end of every sentence.

### Posner

#### Issues with political correctness gon awry are due to campus organizations, not school rules

Posner 16. Eric Posner, 1-8-2016, "Campus Free Speech Problems Are Less Than Meets the Eye," Cato Unbound, https://www.cato-unbound.org/2016/01/08/eric-posner/campus-free-speech-problems-are-less-meets-eye, accessed 3-8-2017. NP

I don’t like political correctness any more than Greg Lukianoff does, but he exaggerates the problem and unfairly blames universities when the problem really lies with students. There are 5,300 colleges and universities in the United States. They educate approximately 20 million students every year. It is hardly surprising that campus administrators who enforce the rules blunder from time to time. In most of Lukianoff’s examples, the student (or professor, in one case) engaged in speech that was on the margin of other activities that are appropriately regulated, such as distributing leaflets and threatening students or faculty. The universities overreacted, but errors are unavoidable. He does not cite an example of a university punishing a student for merely expressing a view that people regard as offensive—Holocaust denial, or white supremacy, or criticism of Muslims, or opposition to affirmative action, or whatever. Moreover, nearly all of Lukianoff’s examples of quasi-censorship take place outside of the university’s core education and research mission. We’re talking about students complaining about how they are treated outside of class, not in it, often at the hands of other students or student organizations. As a law professor, I teach students who are graduates of colleges all around the country. I’ve taken to quizzing them about political correctness and censorship in their colleges. None of them have recounted classmates being punished by administrators for expressing their views. None of them have said that they refrained from expressing a view because of fears that the university would punish them. The few anecdotes I have heard from my students are, like Lukianoff’s, borderline cases where a student expresses views in a way that may threaten campus order, safety, and security. (One such example involved a student who made a bonfire of his books—apparently to express his sentiments about his education, but in a way that understandably caused concern to administrators.) The major threat to free discussion on campus is the ideological conformity of students—who are afraid of losing friends and being hassled by peers if they express ideologically idiosyncratic views—and not university administrators, who are mostly passive and remote.

#### Epistemic humility and support for the fundamental principles of educational institutions require diverse experimentation with different approaches to speech regulation

Posner 16. Eric Posner, 1-8-2016, "Campus Free Speech Problems Are Less Than Meets the Eye," Cato Unbound, https://www.cato-unbound.org/2016/01/08/eric-posner/campus-free-speech-problems-are-less-meets-eye, accessed 3-8-2017. NP

While it is true that most universities have speech codes, these codes are designed not to stifle but to enhance discussion by discouraging students from being rude to each other. One of the oddities of the American university is that students are expected to live together and not just attend classes together. Universities’ understandable but obsessive genuflection to the god of diversity means that students of radically different backgrounds and attitudes are thrown together. The idea is that they are supposed to learn from each other; the reality is that everyone must constantly be on his guard because it is so easy to inadvertently offend someone from a different background by innocently expressing one’s opinion. While Lukianoff and I can retreat from the public square to the privacy of our homes if we find public debate offensive, students who live in dorms have no such option. This is why students so frequently self-segregate by joining fraternities and clubs, and by moving off campus when allowed to. In this way, they act no differently from most Americans who self-segregate by moving to homogenous neighborhoods. But self-segregation within the university can go only so far, and this is why universities insist on the authority to punish students who “harass” each other—meaning who fail to be reasonably polite to each other. This is regulation of manners, not of speech or opinion—in the spirit of time, place, and manner regulations that governments are permitted to impose even under the strict doctrines of First Amendment law. University speech codes (at least, in private universities) go farther because campus life is different from public life. If a white student insists on telling his black roommate that affirmative action is wrong, I doubt any administrator would consider this a violation of speech codes. If instead he calls his roommate racial epithets, I suspect the university would intervene. I don’t know whether Lukianoff would regard this as a violation of the white student’s freedom of speech, but it would be ridiculous to require the black student to tolerate this boorish behavior. Universities approach this problem in many ways. As Lukianoff mentions, some universities leave students to themselves; others use speech codes. The speech codes vary tremendously, as do the punishments that are meted out for violations. The perplexing thing about Lukianoff is that he dogmatically insists that all universities follow exactly the approach he advocates. While Lukianoff may be right that an everything-goes approach may ultimately be best for students, he provides no evidence for this view, and this is because there is no such evidence, one way or the other. It’s certainly not the approach used in the classroom. Teachers almost never permit students to express themselves in a hostile, rude, or insensitive way. This is not some new-fangled, PC-inflected innovation; anyone who has taught a class or been a student knows that willfully obnoxious behavior interferes with learning. Offensive speech gets students riled up and deters them from taking unfamiliar ideas seriously. The regulation of speech outside the classroom is trickier. Various forms of speech regulation may be appropriate for different groups of students. Universities have figured this out, and in fact there is great diversity in how universities regulate speech. Many religious universities, for example, require, or at least say they require, students to keep theologically disreputable views to themselves. Some forbid cursing. While I wouldn’t have wanted to attend such institutions, I see no reason why students shouldn’t attend them if they want to. The intellectual basis of freedom of speech is epistemic humility—the notion that since we cannot be confident that we know the truth, we need to allow people to debate it. But then we must also acknowledge that we don’t and can’t know the best rules for promoting those debates. That’s why, in fact, the First Amendment allows people to form collectivities like newspapers, think tanks, and political parties where the institution itself embodies a certain viewpoint, and all who participate in the institution can be required to accept it (or at least pretend to accept it). We allow liberal newspapers and conservative newspapers rather than requiring all newspapers to publish diverse political views because we think that restrictions of speech within institutions may promote freedom of speech across institutions. The same logic applies to universities, whose leaders should be allowed to experiment in the same way. Lukianoff doesn’t see this because he imagines that free speech is a good in itself. In fact, freedom of speech is a means to an end, and our understanding of free speech must be derived from the end that we seek to achieve. In politics, that end is good governance and political competition. In education, that end is—education. The recent student demands for limitations on freedom of speech—demands that, as he concedes, put him in a “somewhat difficult position”—flummox Lukianoff because free speech is on both sides of the issue. Should he support the students because they exercise freedom of speech, or oppose them because they want to restrict it? He resolves this contradiction by, in effect, arguing that the students should be free to demand speech restrictions as long as universities refuse to submit. But that’s a cop-out. If you know in advance that no one will take seriously your speech, your right to freedom of speech is empty. However, in the Atlantic article that he coauthored with psychologist Jonathan Haidt, Lukianoff does make an argument against restrictions on campus speech based on a specific educational philosophy. Haidt and Lukianoff argue that efforts by students to restrict speech will, if accepted by universities and embodied in speech codes, cause psychological harm to students, and interfere with their education, by protecting them from dangerous ideas rather than forcing them to confront and understand them. The authors may be correct, but it is important to understand that they are taking a specific and contestable position on how universities should teach and how campus life should be regulated. The only way to know whether they are right or wrong is to allow universities to try different approaches, so that we can use evidence to determine which approach is best. Lukianoff the free speech advocate and Lukianoff the educational philosopher are on opposite sides of the question.

### Post

#### The function of universities can not be unbounded freedom of expression – teachers must have discretion to regulate the marketplace of ideas and treat ideas as they see fit

Simpson and Srinivasan. Robert Simpson and Amia Srinivasan. No platforming. users.ox.ac.uk/~corp1468/Research\_&\_Writing\_files/No%20Platforming\_FINAL.pdf NP 3/8/26

The problem, however, is that this view treats the university as if it were just an outlet in the marketplace of ideas or an extension of the public square. This is a mischaracterization. Universities are specialized technical institutions that exist for purposes of teaching and research. Communicative norms and practices in universities reflect these purposes. First, they accord special protection to certain kinds of speech by those responsible for teaching and research: “a personal liberty to pursue the investigation, research, teaching, and publication of any subject matter of professional interest without vocational jeopardy” except in case of “an inexcusable breach of professional ethics in the exercise of that freedom” (van Alstyne 1972: 71). This freedom is needed because the realization of the epistemic aims of teaching and research will be compromised if the employment of teacher-scholars depends on approval from university management, society in general or, especially in the case of state universities, the government (Ibid: 71). 21 In addition, the communicative norms and practices of universities also give recognized disciplinary experts – that is, academic faculty – various kinds of control over the speech of others, as is necessary to create and uphold the intellectual rigors of, and thus promote the epistemic aims of, their disciplines. In the public square we can tolerate the speech of flat-earth cranks, shills paid to undermine climate science, and revisionist historians who espouse conspiratorial misreadings of the evidence. As long as they don’t harass anyone we let them say their piece. 22 But such people are not owed the opportunity to teach History 101 or publish in scientific journals, any more than they are owed a platform to address parliament or a corporate board meeting. More specifically, it is permissible for disciplinary gatekeepers to exclude cranks and shills from valuable communicative platforms in academic contexts, because good teaching and research requires that communicative privileges be given to some and not others, based on people’s disciplinary competence. In short, academic disciplines amplify the speech of experts and routinely silence or marginalize the speech of others. Faculty set the curriculum, and students work within it. The professoriate – not students or the general public – decides which researchers have earned doctoral credentials. Editors of academic journals and presses exercise discretionary judgment to decide whose work will be published. As Post says, academic expertise is supported by such practices, which are not just about the freedom to inquire, but also about “affirmative disciplinary virtues of methodological care”, the maintenance of which “quite contradicts the egalitarian tolerance that defines the marketplace of ideas paradigm of the First Amendment” (2013: vii). And thus, whereas in free speech “there is an equality of status in the field of ideas”, the pursuit of knowledge in academia demands an inequality of status in ideas; it requires “practices that seek to separate true ideas from false ones” (Ibid: 9-10). The university would largely be a waste of time for teachers and students, and its subsidization a waste of resources for the rest of society, were things to be otherwise. In short, communicative practices in universities are not governed by the general liberal precepts that regulate communication in the public square, and when universities do restrict speakers and viewpoints this should not be, and indeed is not, based solely (or even primarily) on purely procedural standards aimed at harm-prevention. Given that no platforming is a practice that takes place in universities, our question should be whether it is compatible with norms of academic freedom in particular, where these norms are understood as distinct from general liberal principles of free speech. Granted, some of the speaking engagements that no platformers target – like commencement addresses, or talks at student societies – are not immediately linked to the teaching and research activities that principles of academic freedom are there to safeguard. But principles of academic freedom are an appropriate reference point all the same, because such speaking events are an important part of the cultural and institutional backdrop against which teaching and research activities are conducted. The norms governing these communicative events – as well as attempts to interfere with them – should therefore be guided by consideration of how they affect the university’s core academic activities

### Braidotti

#### After Brexit and Trump, we need to re-radicalize institutional engagement. That means building an affirmative politics of intersection that critiques democracy but also commits to concrete plans for an alternate world. Your impact gets it wrong: ressentiment emerges from pessimistically accepting our incapacity to do anything other than poeticize.

Braidotti ‘16 (Rosi, Philosopher and Distinguished University Professor @ Utrecht U., “DON’T AGONIZE, ORGANIZE!” http://conversations.e-flux.com/t/rosi-braidotti-don-t-agonize-organize/5294)

One always thinks against one’s times, in spite of the times and out of concern for one’s times. This insight rings painfully true today, as we pick up the pieces of our broken dreams about electing the first woman to the presidency of the USA. As Donna Haraway put it – ever so eloquently – on her Facebook page on November 9, 2016:

"Well, I thought we'd be together battling for a progressive agenda in the context of a neoliberal, partially progressive Clinton administration. I thought climate change and extinction and so much else could be central issues. They must still be. But now we will be together battling fascism, unleashed racism, misogyny, antisemitism, Islamophobia, anti-immigration, and so much else. I feel heartbroken and re-radicalized.”

The operative word here is “re-radicalize” – trying to cope with this traumatic defeat, acknowledging the pain and learning from our and other people’s mistakes, in order to go on and build a new political praxis. I am reminded immediately of Derrida’s comments on the suicidal character of the democratic system, which echo Nietzsche’s thoughts from the previous century. The sobering awareness that democracy in itself is not enough to save us from its electoral majority is crucial at a historical time when the political momentum seems to be on the side of rising populism. In the 1930’s – Virginia Woolf’s time – far too many people voted “democratically” for the national-socialist movements, for fascist and Nazi leaders who then went on to deprive them of their basic rights and to commit atrocities. The repetition of these tendencies in the western world today makes me wonder whether representative democracy is at all immunized against its own reactionary elements.

I am thinking for instance of the manipulative use that has been made of the referendum as a political instrument, not only in the UK, but also in the Netherlands and Italy. A lot of commentators are currently writing on the uses and abuses of the referendum as a tool of government: isn’t representative democracy about allowing our democratically elected representatives to research and pass the suitable legislation to confront the complex issues of the days? Why call a referendum on intricate constitutional or international relations issues? I think it would be far more useful to set up a serious educational program, backed by a full-scale information campaign, talking to people and fellow citizens, also about difficult subject matters. I am not at all sure that the media and social networks are to blame for the misinformation that dominates public debate. What are we to make of the fact that the so-called advanced economies fall for “post-truth” politics, while a country like South Africa opts for the dialogical model of “Truth & Reconciliation” commissions? Maybe it is time to learn from the South?

The electoral victory of a misogynist, unexperienced and unskilled, white male supremacist like Trump, however, reveals far more than the limitations of representative democracy. What we are witnessing is the return of sexist and racist language and practices in the public sphere, coupled with an instrumental use of ideas like the decline of the West, the crisis and the necessity of state violence in times of emergency. Trump capitalized on the frustrations and fears of the former middle classes, badly hit by the fallout of economic globalization. The politics of resentment has quite a long history: Bush himself pursued a similar strategy at the turn of the millennium. Today, new populist movements follow suit, introducing some interesting variations on this old theme.

Contemporary populisms, whether from the Left or from the Right, are the same to me. On the Right of the political spectrum, abstract appeals to sacralized notions of cultural authenticity have replaced or reinforced the rhetoric of blood and soil. Cultural essentialism – or ethno-nationalism – disguised as civic pride, is the refrain of today’s Right-wing populism. On the Left of the political spectrum, classes devastated by decades of economic decline and enforced austerity, have endorsed the public expression of “whitelash”: white people’s – mostly men’s – anger, producing a virulent form of neo-nationalist populism. Racist by visceral reflex, isolationist by default, scared at heart, the “neo-nativist” movements, in their urban as well as rural versions, long for the restoration of an era gone by. They express a sharp sense of threat – of wrongs and injuries translated into political disenchantment and they seem to assume that the only pain that matters in the world is white men’s pain. It makes them misogynist, homo and trans-phobic, as well as xenophobic. Moreover, all populists – at the far Right just as the far Left – have turned against the European Union, as a trans-national space. Why is it so difficult to imagine a post-nationalist Europe? It would be interesting to compare the different kinds of European populisms and interrogate their representations not only of the nation and of the people, but also of the idea of Europe itself.

I cannot accept either the Rights or the Left-wing versions of populism, as they both brutally re-assert whiteness and male supremacism as core values. Just consider the enthusiastic support that a Left-wing intellectual such as Slavoj Zizek has lent to Donald Trump in the few crucial days before the American election. Zizek’s misogyny is well-known, but this time he truly surpassed himself by asserting that Trump is “less dangerous” (to whom? where?) than Clinton. He should be held accountable for it. There is a clear correlation between having or not having access to the resources and advantages of the global economy and the loss of a sense of self-esteem and belonging. But is this enough to plunge us into the abyss of “post-truth” politics?

In the USA as elsewhere, the organized political Left has its share of responsibility to account for. The mistakes of previous generations of leaders and of their old “democratic” coalitions ended up helping the Republicans. Nonetheless, the Right-wing populism of dubious characters such as Donald Trump and Boris Johnson is a nauseating form of political manipulation, because it affects most directly those who are economically worse off. These exploitative politicians only “empathize” with the pain and despair of their electorate to the extent that they encourage them to scape-goat their built-up anger onto women, the LBGTQ community, migrants, foreigners, asylum-seekers and other figures of despised “otherness.” The appeal to strong nationalist leaders who basically promise to solve the problems by building more walls around every single constituency produces what Deleuze and Guattari call micro-fascism. Whether they are they Left or the Right, they are micro-fascists. How many new walls have gone up since the Berlin wall came down? Fortress Europe is one of them, and that’s our immediate and direct responsibility.

In a philosophical perspective, it is almost inevitable to interpret these events through the lenses of Deleuze’s reading of Nietzsche. We find ourselves in a “democratic” political regime where factual truths play no role at all: in Brexit, as in the Trump campaign, people were shamelessly lied to. What mattered most to them was expression of negative emotions and violent passions, like hatred, intolerance, rage, cynicism and opportunism. As a teacher, I believe firmly that my task is to fight untruths and injustices with the instrument of critical reason, but also by speaking truth to power both in classrooms, and in the public sphere. Lies are lies, no matter how many may actually believe them, or much backing they get from the powers-that-be. It is important to advance a radical critique of the vulnerability of representative democracy as a system, starting from two main sources. On the one hand a critical reappraisal of collective action aimed at affirmative forms of social and ethical interaction and the respect for freedom, and on the other hand the historical experiences of feminisms. We need to move beyond dialectical oppositions, beyond the logic of violent antagonism, to develop an operational politics of affirmation. This requires accurate political cartographies of the power relations that we inhabit and by which we are structured. That’s hard work.

Violence, pain and resentment are conducive to paralysis, not to change. I am even more convinced of this the day after Trump’s victory. More than ever we need forms of political opposition that are rich in alternatives, concrete in propositions and attached to everyday projects. This is not a simple or pain-free process, of course, but anger alone is not a project, as Hillary Clinton so lucidly put it. Anger needs to be transformed into the power to act; it needs to become a constitutive force addressed not only “against,” but also in favor of something. It is obvious that Trump and Johnson represent the pit of negativity of our era and that, faced by their dishonesty and violence, we will echo Deleuze and say: No, thank you, we would prefer not to follow you. The crucial question however is: who and how many are “we”? “We” may well be against the alliance of neoliberalism with multiple fundamentalisms, but we need to compose together a plane of agreement about what our shared hopes and aspirations are. We need to agree on what we want to build together as an alternative. Critique and creation work hand-in-hand.

Even more so in the current context, with its xenophobic rhetoric of the state of emergency, governance by fear and perpetual warfare. In the western world the defense of women's and LBGTQ human rights seems to be a last resort, for instance when we are confronted by the rise of violence against women, rapes included; or after the mass murder in Orlando, Florida. Far too often feminist and LBGTQ causes are enlisted in a civilizational discourse that manipulates them in order to assert the alleged supremacy of the West over the rest: emphasis on human rights as a pretext for war and occupation. Within the same western world, however, the resurgence of neo-fundamentalism induces new, subtler but not less violent forms of exclusion and discrimination. They are articulated around the axes of ethnicity and whiteness, gender and sexuality but also around dominant cultural values such as youth and slimness, health, able-bodiedness and access to advanced technologies, to name only some of the components that define the complex phenomenon of contemporary “class” differences.

Postcolonial and race theories have been challenging white privilege for decades, arguing for the need to undo racialized hierarchies and to question the ethnocentric assumptions about what constitutes the basic unit of reference for being human. They join forces with feminist and gender studies to bring home a simple point: that we are not all vulnerable in the same way or to the same extent, and that no group has the monopoly over pain and social exclusion. Non-male, non-white, non-heteronormative, but also non-anthropomorphic beings know on their bodies what it means to be exposed to all sorts of fundamentalisms, racisms and reactionary politics.

Thus, while denouncing the exacerbation of misogyny, racism and cynicism in the present political context, I want to repeat the question I asked before: who and how many are “we”? To what extent can “we” say that “we” are in this together? I want to express solidarity, while avoiding hasty recompositions of one “humanity” bonded in fear and vulnerability. I prefer to defend complexity and multiple ways of being human, that is to say an affirmative definition of what binds us together. I think it important, for instance, in the era of the Anthropocene, to see the close links between neoliberal economic politics and a system of disenfranchisements and exclusion of entire layers of both the human population and the non-human agents of our planet.

The way to handle these issues is to start from the project of composing a “we” that is grounded, accountable and active. This is the collective praxis of affirmative politics, which Spinoza encourages us to embrace against the toxic negativity of the social context. In the midst of our technologically mediated social relations and in response to the paranoid rhetoric of our post-truth democratic leaders, how can we labor together to construct affirmative ethical and political practices? How can we work towards socially sustainable horizons of hope through resistance? What tools can we use to resist nihilism, escape consumeristic individualism and get immunized against xenophobia? The answer is in the doing, in the praxis of composing alliances, transversal connections and in engaging in difficult conversations on what troubles us. “We” need to re-radicalize ourselves.

#### This means the alt solves neither the K nor the affirmative – no organization other than the state has the scale and capacity to regulate extractive industries and corporate exploitation – that’s Parenti. Individualism throws out the potential for a collective solution – which is essential to combat a collective problem like warming

### AT “Liberalism is Racist”

#### No link to the nature preservation environmentalism their Gumbs evidence criticizes – the aff doesn’t harken back to some pristine vision of nature but imagines a future that doesn’t involve the huge public health risks of toxic emissions.

#### The K misdiagnoses the ideological causes of racism and throws out the possibility of tactical analysis of modern liberalism – the relationship is *strictly* historical and contingent.

Joppke 15 – (2015, Christian, PhD in Sociology from UC-Berkeley, Professor and Chair in General Sociology at the University of Bern, Switzerland, “Liberalism and racism: an ‘elective affinity’?” Ethnic and Racial Studies, Special Issue: Ethnic and Racial Studies Review, Volume 38, Issue 8, pages 1298-1304)

The first thing to note is that the authors tend to conflate ‘liberal’ and ‘democratic’. At the theoretical level, they mostly refer to both concepts interchangeably. But empirically they also distinguish ‘liberal’ from ‘populist’ when comparing the type of democratic regime and political culture in place in North America and Latin America, respectively (2). I concede that on an ideal plane ‘liberal’ and ‘democratic’ converge, because freedom and equality – the two lodestars of liberalism – can be had only in a democracy (the most concise exposition of this convergence can be found in de Tocqueville [1969, 504]). But in reality they often part ways and may even work against one another. No one saw this more clearly than Carl Schmitt (1923), who associated democracy with ‘homogeneity’, even the ‘extinction of heterogeneity’ for the sake of ‘equality’, and who knew that democracy thus understood was foreign to the ‘thought world of liberalism’ (Gedankenwelt des Liberalismus), which was more invested with the notion of parliament as ‘government by discussion’. It is fairly obvious that democracy can easily become a shell for racism, as for any discriminatory project of a majority imposing itself over a minority. The demos requires a boundary, which makes it an ethnos. This provides the opening for ‘ethnic cleansing’, as the ‘dark side of democracy’, which did not exist in premodern states where ‘class usually trumps ethnicity’ (Mann 2005, 34). Democracy is dangerous for minorities. This is proved today by the sad reality of right-wing populist movements and parties that target immigrants and Muslims across Europe. And when there is direct democracy, as in Switzerland, the situation is extra dangerous, as its so-called Minaret Initiative and cascading anti-Muslim, anti-immigrant and expulsion (Ausschaffung, in rabid Swiss-German parlance) referenda in recent years demonstrate. And, of course, in Culling the Masses, the ‘democratic origins’ of racist immigration policies are eerily demonstrated.

But the heart of this book's theoretical argument is not with reference to democracy but to liberalism. It consists of the notion of an ‘elective affinity’ between ‘liberalism’ and ‘racism’ (FitzGerald and Cook-Martín 2014, 7). Alas, the nature of this ‘elective affinity’ is never clarified. One could try to do this in the mode of Louis Hartz or George Fredrickson, who both argued that racism is possible only in an egalitarian ‘liberal’ but not in a hierarchical ‘feudal’ culture. In Hartz's (1964) wildly imaginative theory of the ‘founding of new societies’, the ‘bourgeois fragment’ of European history was implanted in the English-speaking settler states, while Europe's ‘feudal’ fragment was carried to Latin America and French Canada. The bourgeois variant made for a particularly harsh slave system, because under conditions of equality the humanity of the slave had to be denied to make his exclusion compatible with a liberal order of equality. This problem is unknown to a feudal system with its formal hierarchy of statuses – hence the gentler race and slave systems south of the USA (observed at least since Tannenbaum 1946). In the same mould, Fredrickson (2002) argued that ‘Western racism’ stands out through the fact that it emerged ‘in a context that presumed human equality of some kind’ (11), so that people ‘can be denied the prospect of equal status only if they allegedly possess some extraordinary deficiency that makes them less than fully human’ – this ‘deficiency’ being of a non-white race (12). Theorizing of this kind would be required to render plausible the hypothesis of an ‘elective affinity’ between liberalism and racism. The authors do engage in some of it (with Hartz and Fredrickson), but only briefly and under the rubric of an alternative (‘inherently linked’) hypothesis that is not endorsed by the authors (see below). Their theoretical abstinence is perhaps wise because more ambition on this front would force them onto treacherous philosophical and speculative ground.

I still find the ‘elective affinity’ hypothesis utterly implausible. Remember that the term ‘elective affinity’ was first used by Max Weber (1979) to deflect the notion that there is a strict causality between the ethics of Protestantism (especially Calvinism) and the ‘spirit of Capitalism’; instead, there was merely a structural homology that consisted of a joint penchant for discipline and deferred gratification in both idea systems or mentalities. But no structural homology (beyond mere complementarity, as argued by Hartz or Fredrickson) connects ‘liberalism’ and ‘racism’. Liberalism, as classically defined by John Stuart Mill (1974 [1859], 68), is the political doctrine that the ‘only purpose for which power can be rightfully exercised over any member of a civilized community, against his will’ is to ‘prevent harm to others’. Liberalism stipulates the equal liberty of all individuals, irrespective of their ascribed birth status (that had determined their standing in a pre-liberal feudal order). It is easy to see that racism is the exact opposite. Racism, as plausibly defined by FitzGerald and Cook-Martín (2014, 15), is the ideology that ‘individuals can be sorted into hierarchically arranged categories based on their perceived ascriptive characteristics and moral capacities’. Under these definitions, no ‘elective affinity’ between liberalism and racism is apparent – on the contrary, they stand as radically opposed to one another as any two idea systems or visions of political order could ever be.

It is correct that Mill ([1859] 1974, 69), just one page after defining the Harm Principle as the essence of liberalism, also limited the reach of this ‘doctrine’ to ‘human beings in the maturity of their faculties’, thus excluding children and – more controversially – ‘those backward states of society in which the race itself may be considered as in its nonage’. And he ups the ante: ‘Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement’ (Mill [1859] 1974). Despite the drastic language, this is strictly speaking still no ‘racist’ argument, because racism denies the possibility of assimilation or positive character change of the ‘lower’ race that is implied in the notion of ‘improvement’ (see Fredrickson 2002, 170). Apartheid, segregation, the prohibition of mixing (as in the anti-miscegenation laws on the books in some American states well into the early 1970s), or even cleansing and extermination are the marks of a racist regime. While this may resonate with democracy (as suggested earlier), it certainly does not with liberalism. Still, it is fact that empire and its doctrine of civilizational superiority (‘and occasionally race and blood ties’ [Mehta 1999, 2]) went along smoothly with liberalism and was even propagated and defended by the leading nineteenth-century British liberals. But nothing in liberalism as such points to its complementation by racism. Both are extrinsic to one another.Of course, the authors concede as much in delimiting their position from a more radical bunch of ‘critical race’ scholars, who stipulate that liberalism and racism are ‘inherently linked’; instead, their preferred ‘elective affinity’ stance flags a ‘nondeterministic and probabilistic relationship’ (FitzGerald and Cook-Martín 2014, 7). But, following its original usage by Weber, there still would need to be a positive structural homology between the ‘electively’ related phenomena, which is just not visible here – except for a barren reference in racism to equality through the stipulated equality of race members that, however, is immediately knocked down by the notion of a hierarchy of races. Liberal and racist views may have been held by the same person, such as British Prime Minister Winston Churchill, who is quoted as saying: ‘Why be apologetic about Anglo Saxon superiority? We are superior’ (69). But this does not diminish the inherent contradiction between both viewpoints.

Liberalism is not a doctrine to determine the boundaries of the groups within which it may be practised; it is simply mute on the boundary question, and must assume it to be resolved before it can kick into action. Liberalism could be historically allied with racism because both relate to different questions: boundary drawing versus intra-group relations. But the relationship between the two is entirely contingent, in that there are other (non-racist, for instance, nationalist) ways to resolve the boundary question. In the latter respect, Mill (2004 [1861], 197) had famously argued that ‘free institutions are next to impossible in a country made up of different nationalities’. One sees that the boundaries need not be racist. One should also note that if one carried liberalism one step further, from intra- to inter-group relations, it would defy the possibility of any boundary, leading to the cosmopolitanism that is the default position of the contemporary liberal intellectual, who is guilt-tripped by living in the comfort zone.

In their typology of approaches to make sense of the ‘conjoined histories of liberalism and racism’, FitzGerald and Cook-Martín (2014) take one approach, as mentioned, to be the claim that liberalism and racism are ‘inherently linked’ (4), and they set it apart from their own ‘elective affinity’ hypothesis. They associate the ‘inherently linked’ position with a broad swathe of authors from J.S. Mill to contemporary comparativists like Desmond King, Anthony Marx, or Michael Mann, and above all radical ‘critical race’ scholars. But it seems to me that no clear line can be drawn between the ‘inherently linked’ and the ‘elective affinity’ position. This is obvious when delimiting the two from a third approach – the ‘multiple traditions’ approach known from the work of Rogers Smith (1997). This approach is faulted for missing the ‘patterns of connection’ among liberalism and racism (FitzGerald and Cook-Martín 2014, 6), that is, for taking the two as separate things. But then there is more that ‘elective affinity’ has in common with ‘inherently linked’ than both have in common with ‘multiple traditions’ – the first is a weaker version of the second (denying the necessity of a linkage, which is an absurd proposition to begin with), and both are different from the third in stating a ‘connection’.

### El-Enany

#### The rise of the hyper-nationalism proves that we can’t abrogate institutional analysis – the ability to ignore the law is a sign of privilege

Keenan and El-Enany 12/2/16 <http://criticallegalthinking.com/2016/12/02/beware-ivory-dwellings-left-political-purity-face-fascism/> Nadine El-Enany and Sarah Keenan are Lecturers in Law, Birkbeck Law School, University of London

For some time we have been witnessing the rise of racist nationalism and fascism in many parts of the world. In Europe and North America, significant elements of both the Brexit and Trump campaigns propagated explicitly racist ideals, albeit to varying degrees. Whether you understand Brexit and Trump as having triumphed despite or because of the racism that dominated both campaigns, the reality is that these victories have legitimised white supremacy in alarming ways. Despite the increasing rise in racist violence and rhetoric, some on the Left are reluctant to acknowledge the severity of this political development, in part because of a preference to perceive the Brexit and Trump victories as anti-establishment movements/the end of neoliberalism/expressions of the legitimate grievances of ‘the white working class’/a more honest face to an already racist and violent liberal order. As the racist horrors of the EU referendum unfolded, from widespread fear-mongering linking EU migration to ISIS, to the brutal murder of pro-Remain MP Jo Cox by a white supremacist a week before the vote, some Leftists continued to advocate for a leave vote. In the wake of the Leave victory, many Lexiters encouraged people to unite and work together in what they see as a moment of opportunity for dramatic change. A few months later, despite Trump’s campaign having been endorsed by the Ku Klux Klan, and his victory unleashing a wave of violence by emboldened and gleeful white supremacists, some on the Left cautiously welcomed his election as a ‘shakeup’ of the status quo, a development preferable to a Clinton presidency because of its potential to force a new political mobilisation on the Left. No doubt these positions are well-meaning, driven by a concern to end the structural violence of neoliberal capitalism and a commitment to radically transforming societies through a fairer distribution of material resources. But there are dangers to prioritising political ideals and goals at whatever cost. If the rise of racist nationalism and fascism are to be countered, political purity is a luxury the Left cannot afford. This is especially so in relation to law, which is often the last chance of protection for the most vulnerable in society. In a recent commentary on the High Court judgment in the case of Miller v Secretary of State for Exiting the European Union, Paul O’Connell and Nimer Sultany, concerned to highlight the ‘popular grievance at the base of Brexit’, put forward an argument on ‘what it means to adopt a critical stance vis-à-vis constitutional developments and judgments’. The case was decided in favour of Miller, the High Court ruling that Theresa May, as head of the executive branch of government, cannot trigger Article 50 of the Lisbon Treaty, the process for exiting the EU, without the consent of Parliament. The judgment was met with unbridled rage from some corners, with the the litigant, Gina Miller bombarded with rape and death threats, and the High Court judges described as ‘enemies of the people’ on the front page of The Daily Mail. O’Connell and Sultany argue that legal scholars who have defended the judgment on the basis that it concerned a purely legal matter are failing to be sufficiently critical. For them, taking a critical stance on the Miller decision requires acknowledging that it was political and not merely a matter of legal interpretation. They insist that judicial decision-making is anti-democratic, and particularly so in this instance because, as they see it, the judgment goes against a ‘majoritarian choice’ and hinders the implementation of the Brexit vote, a result born out of a ‘participatory’ exercise in democracy. O’Connell and Sultany’s position begs the question of who is represented in the purportedly participatory democratic process of referenda? The EU referendum was explicitly exclusive of those who would be made most vulnerable to harm and insecurity by its result. In particular, EU migrants and people with insecure immigration statuses were not permitted to vote. The referendum debate was eclipsed by the topic of migration, with the Brexit campaign unrelenting in its scapegoating of migrants, calling on voters to ‘take back control of our borders‘. Since the referendum, racist hate crime is up by 16% across the country and peaked at a 58% increase in the week following the vote. Just weeks after the referendum, Arkadiusz Jóźwik was beaten to death in Essex, having reportedly been attacked for speaking Polish in the street. While referenda may give majorities a vote, they can be dangerous, undemocratic exercises entailing people voting on whether their neighbours should be deported. Along with the undemocratic nature of the EU referendum, the danger of O’Connell and Sultany’s critique of judicial power is its upshot: the bolstering of executive power. In a structurally racist, sexist and elitist society, of course any exercise of judicial power is necessarily political. But to argue for the enhancement of executive power as an alternative, or even to entertain it as a byproduct of limiting judicial power, is dangerous. Executive government is a far cry from ‘government by the people’. It is a privilege to be in a position to criticise judicial power, but for people at the hard end of executive decisions, judicial review can be all that stands between them and the brute force of state power. What of the migrant with an insecure status subject to a deportation order by the Home Secretary, her only hope a judicial review of that decision whereby a judge might stay the deportation? Judicial review is also the final avenue for prisoners appealing parole decisions and pensioners challenging reductions in their rent assistance. To argue that a critical stance requires a rejection of judicial power in favour of majoritarian decision-making is dangerous if the upshot is the strengthening of executive power, and betrays an absence of consideration of the position of the most marginalised in society. In an imperfect world, one imbued with structures which expose racialised people, women and non-binary people to violence and premature death, a critical praxis must have survival of the most vulnerable at the core of its strategy. Those who are privileged enough to not be at risk of new levels of violence whatever the outcome of a majoritarian process, must adopt the position that ensures the least violence for the most vulnerable. Critical race feminists have much to teach us in this regard. The failure or unwillingness of some on the Left to meaningfully engage with critical race feminist theory and strategy when this work is urgently needed is not only dangerous, but reveals a profound lack of understanding of the structural production and effects of racism. Critical scholars and activists have put much intellectual effort into developing structural understandings of class, but many have failed to do the same for race. This failure not only replicates and reproduces structures which make invisible the work of feminist and race scholars, but has also facilitated the accommodation of left, ‘critical’ political positions that bolster rather than challenge the reality of a burgeoning far-right movement which is endangering the lives of racialised minorities. Having to fight for survival in a structurally violent world requires being strategic in relation to law. Recalling the words of Mari Matsuda is helpful here: There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand in the courtroom and say, “this is a nation of laws, laws recognising fundamental values of rights, equality and personhood.” Sometimes, as Angela Davis did, there is a need to make both speeches in one day.1

#### Expressing an opoinion about the state is not the same as legitimizing it as an ethical actor – the state can make policy decision that are less unethical than others.

### F

The fake book in Columbia University’s Butler Library seemed like a too-obvious clue from an old detective novel. When opened, the hollowed-out copy of Thomas Hardy’s Tess of the d’Urbervilles revealed a box full of forms branded with an eagle. “Topics interested in,” the ominous questionnaire asked, “Post-Democracy,” “Nationalism,” and “Alternative Right.” The book appeared to be a secret recruiting document for members of the alt-right, hidden in the sprawling stacks of a liberal college, until a library worker discovered it and reported it to the student publication Bwog this week. But the book’s alleged owners told The Daily Beast they waited all semester for a stranger to stumble on the tome. They claimed to represent members of the “Dark Enlightenment,” a grandiose name for a racist, anti-democratic, conservative movement that helped fuel the rise of 2016’s alt-right, neo-Nazi trolls. They’re recruiting on college campuses across the country, they said. But they won’t show their faces; they need a safe space. The Dark Enlightenment or “neoreaction” is a loose collection of anti-democratic, conservative ideas popularized in the early 2010s by writers like Nick Land and Curtis Yarvin (who writes under the name Menicus Moldbug). The movement, beloved of forums like Reddit and 8chan, calls for the upheaval of democracy and liberal ideology, and a return to a more autocratic rule. Believers often preach rigid race and gender binaries, and yearn for authoritarian leadership, be it at the hands of capitalist technocrats, monarchs, or politicians who appear fascistic in all but name. But their alleged on-campus clubs are very touchy about being called fascists, or even being identified. The Columbia University branch’s spokesperson used the screen name “DarkEn” to communicate with The Daily Beast and refused to give their real name, saying they didn’t harbor a “a death wish.” “The Dark Enlightenment and certainly our group is opposed to fascism and ‘Nazism,’” DarkEn told The Daily Beast, in response to fellow students likening them to fascists and Nazis. To associate them with Nazis is “total journalistic irresponsibility,” DarkEn wrote. The Dark Enlightenment takes itself more seriously than the anime Nazi sprawl of the alt-right, which Columbia’s alleged club maintains is an offshoot of Dark Enlightenment thinking. “That label came after ‘Dark Enlightenment,” DarkEn said of being called alt-right. “[T]hat is like calling a Tiger or a Lion a Liger.” The Dark Enlightenment doesn’t even have good memes. But while these neo-reactionaries might consider themselves more philosopher-kings than meme-lords, they share the same slush of illiberal ideology as their alt-right cousins. The group wants to stamp out “secular progressivism,” which they see “as a religion,” DarkEn said, referring to “The Cathedral,” a Dark Enlightenment concept that describes liberal, pro-democratic ideology as it exists in higher education. In the language of the alt-right and much of Donald Trump’s base, this idea translates to the phantom menace of “political correctness.” So that’s how the Dark Enlightenment branded their college putsch. Like a fraternity, the group’s pledge drive began in September, when students at Columbia University and New York University reported posters for the “Dark Enlightenment Club” hanging in their libraries. “Are you politically incorrect? We are,” the posters read, boasting of “weekly meetings.” The posters encouraged readers to contact the schools’ respective chapter heads on a secure messaging app. GET THE BEAST IN YOUR INBOX! Enter your email address By clicking "Subscribe," you agree to have read the Terms of Use and Privacy Policy SUBSCRIBE The Daily Beast contacted the Columbia and NYU chapter heads, who claimed to be different people. They claimed to have branches at “some of the Ivy’s [sic] and a few others” including “NYU, Stanford and Yale [sic].” Both refused to disclose their identities or provide evidence of a Dark Enlightenment Club whose members met weekly. Previous alt-right campaigns have hoaxed the city’s colleges, including NYU. In November 2015, a Facebook user created a page for an “NYU White Student Union,” sparking indignation and mockery on campus until the group was revealed to be the work of trolls from white supremacist websites, who did not attend the school. But the alleged “Dark Enlightenment Club” had at least one member with access to Columbia’s and NYU’s libraries. (Columbia and NYU share some library privileges, so a student at one campus could have access to the other.) The hollow book discovered at Columbia contained manila envelopes with what appeared to be application forms, Bwog reported. The outside was emblazoned with a stylized eagle, reminiscent of those adopted by fascist regimes. The inside asked applicants to complete a form with their time availability and whether they were interested in “leadership position[s].” The form also asked about the respondents’ interests from a list of “post-democracy,” “nationalism,” “HBD,” “alternative right,” “cultural Marxism,” “‘The Cathedral,’” “economic systems,” and “other.” “HBD” stands for “human biodiversity,” a faux-scientific concept that claims races are inherently distinct and have different characteristics like intelligence and values, and is used to justify racial inequality by attributing it to genetics rather than structural racism. (DarkEn argued that HBD does “not make the claim that any race is superior,” then suggested that high IQ scores among Asian people could be attributed to Chinese genetic programs, and that races might have inherently different values.) The Dark Enlightenment Club placed the book in the Columbia library at the beginning of the semester, hoping it would be found and inspire others to join their movement, DarkEn said. But while the Dark Enlightenment Club was able to prove its connections to a large Dark Enlightenment forum, spokespersons for NYU and Columbia declined to offer evidence of the group’s size or existence on campus. DarkEn also declined to connect The Daily Beast with other alleged branches outside Manhattan. “We have members in high places who could vouch,” the club’s NYU leader told The Daily Beast, while declining to give his name or those of anyone in the group. He vehemently denied that his group was “safe space.”

### Powell

#### Only delimitations of acceptable and unacceptable speech makes language coherent – racist speech materializes racial constructions and should be excluded

Powell 98. John A. Powell, (John A. Powell leads the UC Berkeley Haas Institute for a Fair and Inclusive Society and holds the Robert D. Haas Chancellor’s Chair in Equity and Inclusion,) As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society, 16 Law & Ineq. 97 (1998), Available at: <http://scholarship.law.berkeley.edu/facpubs/239>. NP 3/17/17.

Like a richer view of the self, racial categories are not static, natural or coherent. Race is a social construct, and powerful social forces operate to render racial classifications opaque. Language materializes racial constructions. Epithets and similar linguistic constructions seriously harm minority members of society, individually and collectively, because of what such constructions suggest about the described individual's place within our social fabric. Yet when society debates the issue of how to regulate hate speech, the focus is primarily on the infringement of liberty interests. Unfortunately, we often overlook or misunderstand abuses of free speech, such as the tendency of free-speech advocates to portray their opinions in a way that precludes others' ideas. 5 Most Americans, including scholars and judges, take it as self-evident that we are free to "speak our minds."6 Yet as Professor Fish observes, "restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without ... an inbuilt sense of what it would be meaningless ... or wrong to say, there could be no assertion and no reason for asserting it."7 Nonetheless, the assertion that free speech in fact is not "free," and should not be free, involves for many a degree of cognitive dissonance.8 This discomfort occurs precisely because our tradition purports to embrace unconstrained expression. 9 First Amendment discourse traditionally forms part of the larger, more general narrative of liberty. Within this liberty narrative exists a rich but incoherent array of values that scholars often invoke to support an expansive notion of free speech.10 Free expression occupies a privileged position in our democratic society because many feel that any suppression would stifle the liberty and autonomy interests of the speaker, listeners and society in general. In recent years, courts and scholars have begun to question to what extent and under what conditions speech actually promotes individual autonomy," checks censorship 12 or ensures the attainment of truth and knowledge 13 in an uninhibited marketplace of ideas. 14 To promote these values, orthodox proponents of free speech argue that suppression of expression cannot be justified unless the speech falls within a recognized category of harmful speech. 15 Therefore, orthodox free speech advocates refuse to examine harms from speech falling outside of the recognized categories.

#### The marketplace of ideas can not self-regulate – democracy demands equality and opportunities for all to participate, which necessitates restricting speech

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While the exalted status of the First Amendment among liberal values is understandable, 23 history teaches that no one value supporting democratic society remains static, either in importance or in application. 24 The reverence the First Amendment has traditionally been accorded as a means of vitiating multiple tyrannies should not mean that classic doctrinal formulations are sacrosanct.25 This Article suggests that a democratically valid judicial decision must clearly enunciate a conception of justice informed by an awareness of the multiple values within our society and the multiple identities within ourselves. 26 Reformulation of identity in light of the insights proffered by critical race and post-modern theorists suggests that the classic remedy for harmful speech that is, more speech-will, in some instances, perpetuate disparities of power and destabilize our sense of self. The marketplace of ideas cannot self-regulate so long as objections to lack of participatory access are subsumed by claims that the liberty interest in expression is primary to the equality interest in participatory access. A self-regulating marketplace presupposes an equal starting line an assumption that has never been a reality in American political life.27 speech may be preserved through an adoption of a democratically pragmatic conception of participatory justice. This Article concludes by examining Keegstra v. Regina,28 a Canadian Supreme Court case that serves as an example of how lucid reasoning concerning the fundamental interest in participatory access is capable of balancing the values of both liberty and equality. This Article also concludes that in recognizing participation as a value superior to any significant experience of or aspiration to liberty or equality, authentic democratic foundations presuppose that all actors share a common narrative grounding. Recourse to the regulative ideals of democracy will not, of course, prove to be a panacea. Rather, by recognizing the plasticity and multiplicity embedded in a mature democratic vision, we can identify and work toward resolving unnecessarily pronounced tensions. Contextualized discussions of opposing narratives demonstrate that in many ways the referents are the same-the demand for equal liberty is also a demand for democratic equality.

#### Affirming an absolutist conception of speech ignores our own subjectivity and erases the multiplicity of speech//could be a deleuze turn

Powell 98. John A. Powell, (John A. Powell leads the UC Berkeley Haas Institute for a Fair and Inclusive Society and holds the Robert D. Haas Chancellor’s Chair in Equity and Inclusion,) As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society, 16 Law & Ineq. 97 (1998), Available at: <http://scholarship.law.berkeley.edu/facpubs/239>. P107-108. NP 3/17/17.

Journalists offer an excellent example of the way our narratives construct and constrict our interests and responses. I often receive calls from reporters after racist incidents on college campuses. They are almost always interested in whether explicitly racist incitements might lead to the consideration of policies to limit speech by the college. Very few are interested in the rise of explicit racism and the consequent threat to equal opportunity for minority groups on college campuses. To the extent that they recognize these issues, they see them as trumped by free speech concerns. 49 There is both a failure to seriously engage other perspectives and to see free speech as more than a unitary concept. There is an assumed harm associated with anything less than an absolutist view of speech and a trivialization of the serious harm that speech can and does cause. After speech is situated in a primary position, concern about racist hate speech and White domination through speech is seen as no more than a move to censor, or at least chill, speech. This happens without serious consideration of the chilling and more destructive effects of speech that maintain exclusion and racial dominance. Professor Fish similarly observes that when journalists reflexively complain that hate speech regulations may have a potentially "chilling effect," they focus on the right of expression to the detriment of other rights.50 That is, they fail to consider how the chilling effect of hate speech impacts upon targeted minorities constitution of self or participation. Of course, the world only makes sense because we have an orientation to it, and it is inimical to our social psychology not to identify with that perspective. 51 In ignoring or suppressing the subjectivity of our perspective, we fail to examine the multiple and various functions of speech that are at times in conflict with the values underlying freedom of speech. Problems occur when the lens through which we see the world destroys our ability to recognize that what is peripheral for us may be central or defining for others. Through this failure to notice and examine that which is outside the dominant perspective, the harm caused by the free speech regime is either undetected, or when detected, seen as negligible.

#### The idea that more speech can remedy harms reproduces power disparities and inequity in participatory access – this comes prior to your democratic values

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The unfortunate reality is that the "more speech" remedy is ineffectual where one party to an exchange lacks the capacity for empathetic and respectful dialogue and the other lacks the power to mandate engagement. Where parties to an exchange share little in the way of overlapping narratives, assertions and counter assertions are likely to remain parallel, passing each other without ever engaging the intended listener. This does not mean that members of a democratic society should not strive to gain an understanding of perspectives outside their own experience. Nonetheless, the current reality, ignored by the traditional First Amendment narrative, is that the marketplace of ideas is not only skewed, but by its nature incapable of neutrality. The marketplace of ideas excludes and thus reproduces disparities in power. Disparities in power lead to disparities in participatory access. It is clear that in many hate speech cases the purpose and the effect is to injure and exclude, not to find the truth or engage in mere self expression. The marketplace of ideas metaphor became popular when society still believed in an objective truth. As this belief has been undermined, the apparent power of the metaphor is called into question. Some commentators have recognized this and have suggested a foundation based on a weaker claim of objective truth. Bollinger has argued for more speech based on a tolerance rationale instead of a truth rationale, and Baker has used liberty as his foundation.55 I have suggested that the function and values related to speech are varied and multiple, which suggests that the foundation and justification for speech must also be varied and multiple. But because of the unstable and multiple nature of speech values and truth, I assert that participation in the democratic self-constitutive process is prior to liberty and tolerance in many sites. While the value of respect has received significant attention,56 too little commentary exists discussing the uneasy relation between empathy and law. 57 As used in this Article, empathy refers to an experientially defined emotional response to the situation of another, the capacity to dance lightly in another's reality. Empathy requires consideration and effort and thus presupposes an experiential component 58 insofar as it is evocative of a desire to transform59 the necessarily limited bounds of one's experiential reality.60 Genuine empathy is an active process, rather than a passive statement of principle. 61

#### The only way to account for the initial failures of the liberalism is through experimentation and openness that leaves open the possibility for critical revision

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One commentator believes that the solutions proffered by liberalism for our most disruptive social problems are mere tinkering on the surface, and that racism is coterminous with the ideals of the Enlightenment project.85 The truth in this position is a necessary adjunct to the imposition of a convenient legal formalism with respect to issues of race. But it is difficult to know how liberalism and racism will be linked in the future even if they were coterminous at their inception. Professor Unger suggests a way out of this negative dilemma in his admonition that precisely because our instincts and analyses may deceive us, we never know if a particular maneuver will be major or minor.86 This inherent ambiguity should not cause despair,87 but rather insist on deeply experiential methodology reliant for its normative prowess on the persuasive capacities of perspectives arising from endured vulnerability and radical openness. This pragmatic epistemology suggests that a revisioning of empathy as a core democratic value requires that the concept be re-described in a way that embraces the openness that bathos or false empathy so notably lack. We are not hopelessly constrained by our perspectives-rather through engagement and vulnerability we can be influenced in a way that incrementally transforms our character. 88 Engagement does not entail becoming the other but rather requires possible openness to meaningful, contextualized encounters. This is not an idealist stance that ignores structural or institutional arrangements but asserts that structure once visible can be rearranged to allow for empathy and democracy.

#### A pragmatist account of the multiplicity of the self retains the value of post-modernist arguments in favor of fragmentation while avoiding a nihilistic conclusion

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A common response to the assertion that knowledge is provisional and thus undeserving of an uncritical dominance is to invoke the negative aspects of post-modernism.8 9 In one form, the post-modern world view perceives fundamental cultural fragmentation and collapse, a pathological splintering in all spheres of life. More particularly, certain post-modern theorists have characterized modern culture as ironically degraded or bemusedly crisic, or as kitsch laden.90 Presented in this manner, post-modernism seems only to tear down or denigrate the achievements of liberal modernity without offering an alternative. One alternative to the negative definitions so prevalent in post-modern discourse can be found in the psychological and theological concept of multiplicity. Multiplicity, most notably represented in the work of the neo-Jungian psychologist James Hillman, holds that the "crisis" of cultural fragmentation results from our psychological insistence on unity and singularity. 91 Borrowing from Greek mythology and Jungian traditions, Hillman counsels against a psychology of exclusion. In his view, psychological "polytheism" implies an essential and profound division of the soul.92 Rather than viewing this fragmentation as a pathology, however, Hillman suggests that society would benefit from an alternative definition of the psyche. Hillman prescribes a restructuring of our view of the psyche as naturally multiple-in other words, altering our definitions instead of expanding our notion of disorder. It is no accident of history, he suggests, that the term "schizophrenia" and the number of cases of pathological multiple personalities appear at around the same time as the First World War, a time when the definition of the ego as a unifying force stood in stark contrast to the existential dissociations of early cultural modernism. 93 Hillman also refers to William James, who recognized psychological and cultural fragmentation nearly a century ago, noting that "[r]eality MAY exist in distributive form, in the shape not of an all but of a set of eaches, just as it seems to be." 94 The multiplicity of the self has long been applied to problems of identity outside of the American, Western tradition.9 5 The concept of "selflessness" in Buddhist philosophy denies "a self described in terms of its structure rather than its story."96 This structural self, initially perceived as "permanent, unitary, and under its own power," diminishes in importance once the Buddhist practitioner begins to understand emptiness. 97 This process requires a thorough familiarity with the "ordinary experience of self,"98 which, once achieved, permits the insight of "emptiness"- the recognition of persons and things as "dependent arisings," existing interdependently rather than independently. 99 In this philosophy, the self that people tend to see as concrete exists only as an illusion, but an illusion with ethical consequences. Though consideration of such views moves us seemingly far afield from prevailing legal discourse, the tenets of Buddhist philosophies and neo-Jungian psychology suggest that perhaps the conceptions of self-identity embedded in legal structures leave us predisposed to attach ourselves to the illusory narrative of the unitary self. Both show us how the constructed and unessential phenomena of language and concepts create the patterns that we perceive as static, natural and neutral.100 One of the central insights of psychological multiplicity is the notion that many liberal paradigms rest on faulty psychological premises. As illustrated below, multiplicity explains some of the ways in which the psychological phenomenon of "projection"''1 1 serves to mask power disparities that undermine the traditional First Amendment narrative's remedy of "more speech." The central point to be derived from the following discussion is that psychological phenomena camouflage acts in which the dominant culture vilifies and silences minorities, thereby blocking meaningful access to democratic institutions. The argument that the marketplace of ideas perpetuates disparities in power does not, as Cass Sunstein notes, suggest that free speech is a myth. 102 Rather, it means that "what seems to be government regulation of speech might, in some circumstances, promote free speech .... [and] that what seems to be free speech in markets might, on reflection, amount to an abridgment of free speech."'1 3 The discourse within the marketplace of ideas may, in some instances, permit a position that is not only unpopular, but hateful, to limit the participation interest of other individuals. After exploring the more abstract insights of multiplicity, I will examine its utility in First Amendment jurisprudence

#### Your understanding of regulation of speech as an abridgment of it rests on faulty psychological premises

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#### A notion of free speech that idealizes non-interference on behalf of the government contradicts democratic ideals and a notion of the self as socially constituted

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This experience of the shadow operates at the level of racial politics as in all interpersonal relationships. Angela Harris paral- lels Hillman in observing that for groups denominated as racially "other" the "experience of multiplicity is also a sense of self- contradiction, of containing the oppressor within one self."130 In much the same way, the White oppressor also contains the other within him or herself. The contrast between Hillman and Harris occurs only to the extent that Hillman locates the shadow of ra cism as being "essentially present in 'white' consciousness itself and not, as usually claimed, only projected outward into 'black."' 13' A concrete example of the external and internal function of the "other" as a disembodied yet integral part of the self occurs in the process of exclusions by race and socioeconomic status. As Zora Neale Hurston's character Janie, from Their Eyes Were Watching God, painfully recalls, being placed in a social context of '"Whiteness" changed her experience of self: So when we looked at de picture and everybody got pointed out there wasn't nobody left except a real dark little girl with long hair standing by Eleanor. Dat's where Ah wuz s'posed to be, but Ah couldn't recognize dat dark chile as me. So Ah ast, 'where is me? Ah don't see me.' 132 In order to understand the ontology of the fractured self, it is im- portant to question the construction of categories. Law as a rule does not have the dubious luxury, promoted in Hillman's image of psychology, of allowing psychological polytheism to erupt without attempting to achieve insight.133 The law's view of the self has nudged forward, but it is still largely based in an eighteenth cen- tury notion of the self that cannot withstand critical review from psychological, anthropological, or popular perspectives. Yet the multiple self is shadowed in the work of Freud and Jung and is in full bloom in Hillman's. Law loves stable categories, even if they are in conflict with reality, and to reconcile this need with an es- sentially multiple conception of the self requires that we under- take an examination of how categories are articulated and become culturally intelligible and legally manageable. The burgeoning literature on the social construction of race and the renaissance of interest in the work of authors such as James Baldwin and Zora Neale Hurston assist in this endeavor. Both the Buddhist concept of the self, or no permanent self, and Hillman's concept of the multiple self are in sharp contrast to the nineteenth century notion of an independent, unitary, autonomous self. Instead both of these selves share substantial similarities with concepts of the self suggested by many late mod- ernists and feminists. The latter groups tend to view the self as interdependent, interconnected, and constantly being reconsti- tuted through social interaction. If any of these views of the self are taken seriously as con- trasts to the pre-given, unconstituted, liberal self, then systematic exclusion through hate speech not only threatens participation, but threatens both the construction and maintenance of the whole notion of an autonomous self.135 Furthermore, the diminished selves that result from exclusion cannot be healed through more speech. The self that requires the exclusion of other potential selves through hate speech and other practices is not simply an in- dependent self, but a self that requires the subordination of others, a direct conflict with our democratic norms. What this suggests is that restrictions on speech should be challenged to the extent that they undermine the self, as well as to the extent that they undermine our participation in democratic processes. This is no less true of other values, however, such as equality.136 Racist speech, however, is often practiced for the pur- pose of distorting participation and is part of a racial discourse that not only maintains racial hierarchy and exclusion, but also helps to create and maintain the racial subject. In fact, the very categories of Whiteness and racial Other are part of racial exclu- sion and racial discourse.137 The political legacy that flows from racist speech is constitutive of both the racial self and White su- premacy. If one is then seriously concerned about self expression, participation and autonomy, then one must be willing to examine how and where speech disrupts these values. There must be a self, for self-expression to have meaning. One can easily imagine cir- cumstances where speech or equality diminishes the self and par- ticipation, just as in some circumstances speech or equality will support these values. When speech undermines the self, however, it is difficult to articulate how it can be justified by democratic norms. It seems clear that the existing categories of free speech ju- risprudence do not comport with the reality of the socially con- structed racial self as illuminated by an empathetic understanding of our multiple identities. Arguments concerning the persistence of racism in insidious and subtle forms are rendered mutely inar- ticulate by the correct categories. Our propensity to project undesirable characteristics onto a political other serves to perpetuate and reify deeply embedded structural disparities in the market- place of ideas. As Professor Sunstein points out, while constitu- tional jurisprudence has long since abandoned the Lochner-era view of the Constitution as a prohibition of governmental interfer- ence with the distribution of rights, this laissez-faire attitude per- sists in the area of free expression.138 Within the First Amend- ment framework, pre-New Deal notions of neutrality still predominate. 3 9 On one hand, the First Amendment's defiance of New Deal insights into the nature of unregulated marketplaces serves the important value of checking myopic governmental re- strictions on individual liberties. 140 On the other hand, however, the persistence of laissez-faire attitudes toward the marketplace of ideas is a function of our inability to recognize the prevalence of unconscious racist attitudes and practices. Because these atti- tudes persist beneath the surface of American life, the occasional eruption of hateful forms of expression is treated as anomalous. This position, while psychologically soothing, fails to recognize the severe harm to the minority cultures' participatory interests that occurs when an overtly threatening act of racial hatred supple- ments the structural de facto racism by the majority culture of our society.

#### The pragmatist view of democracy is consistent with a fallibilist theory of knowledge

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The view of experience as not only made up of present choices, but constitutive of our future selves, is most vividly set forth in the tradition of American pragmatism, 176 beginning with great independent thinkers such as Jefferson, Lincoln, and Emer- son, reaching its height in the works of Dewey, James, and Pierce, and continuing today as a common underpinning to the divergent work of Seyla Benhabib, Richard Rorty and Cornel West. In the legal academia such diverse scholars as Daniel Farber, Richard Posner, Martha Nussbaum, J.M. Balkin, Stanley Fish and Drucilla Cornell invoke the tools of pragmatism. 177 Though much separates these thinkers, they notably share a preference for "shaping the future [compared] to maintaining continuity with the past."'178 They also share an adherence to the belief that "a fallibilist theory of knowledge emphasizes, as preconditions to the growth of scien- tific and other forms of knowledge, the continual testing and retesting of accepted 'truths,' the constant kicking over of sacred cows-in short, a commitment to robust and free-wheeling inquiry .... '"179 This philosophy is disruptive to traditional modes of thinking within legal institutions. Judge Posner artfully explains that: Although American lawyers have made significant contribu- tions to the theory of free speech, their attitude toward law it- self is pious and reverential rather than inquiring and chal- lenging. Law is not a sacred text, however, but a usually humdrum social practice vaguely bounded by ethical and po- litical convictions. The soundness of legal interpretations and other legal propositions is best gauged, therefore, by an ex- amination of their consequences in the world of fact .... [Tihere is a tendency in law to look backward rather than for- riential flux.1 The challenge posed by pragmatism is to recognize the extent to which the past, as represented by the present, implicates the fu- ture. John Dewey acknowledged the profound constructedness of pragmatism when he noted that "[s]ociety not only continues to exist by transmission, by communication, but it may fairly be said to exist in transmission, in communication."' 181 Community building occurs through a process of communication that results in shared aims, beliefs, aspirations and knowledge.182 According to Dewey, this process must ensure participation in a common under- standing, in such a way as to secure a common manner of re- sponding to expectations. In this way, communication is always instructive, both for the recipient and for the one communicating an experience. Communication is educational because to commu- nicate one must formulate an experience: "[t]o formulate requires getting outside of it, seeing it as another would see it, considering what points of contact it has with the life of another so that it may be got into such form that he can appreciate its meaning."'183 In the end, the process of community building through communica- tion not only educates, but "creates responsibility for accuracy and vividness of statement and thought."'8 4 This last phrase bears strong similarities to the "ideal speech situation" propounded by Habermas'8 5 insofar as it shows a lack of concern for metaphysical inquiry, and a pronounced bias for par- ticipatory equality in an experientially inclined democracy. 8 6 Re- formulated less abstractly, Dewey's belief in the force of experience leads one to inquire about the communities which are confined, if not in spirit, then in fact. The fortress domesticity currently holding sway in large segments of society marginalizes narratives by removing them from the mix that will eventually culminate in a set of shared values, assumptions, and methods for extracting these norms from experience. 187 Society is undermined by our practice of power and hegemony.

#### The environment created in educational spaces delimits possibilities for education

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If our capacities stem from minimizing external constraints to full participation in the social environment, the continuing re- formulation of particular social environments will become neces sary. Dewey, providing a developed philosophical framework for Lincoln's observations, understood experience as having specific consequences for the future.20 6 Experience for Dewey involves both an act and a passive reception of that act's consequence: "[w]hen an activity is continued into the undergoing of conse- quences, when the change made by action is reflected back into a change made in us, the mere flux is loaded with significance. We learn something."207 In this understanding of education, the "unconscious influence of the environment" plays a significant role. The operations of our interpretive community establish the trajectory and ultimately delimit the parameters of our education. From the centrality of consequences and the contingency of truth springs the realization that all our opinions and beliefs have ethical consequences. Dewey argues that "[a]n empiricism which is content with repeating facts already past has no place for possi- bility and for liberty."20 9 The future has significance because hu- man agency can make a difference-actions and opinions trans- form future aims and purposes. Belief in transformation and evolving notions of justice is an integral part of the American ide- ology, dating from Emerson to the present day.210 Although that belief can be challenged by despair over the still remote approxi- mation to the promise of authentic democracy, 211 pragmatism ad- monishes us to retain the belief that notions such as "justice" and "liberty" can be assessed through the actual, substantive results of the law.

#### Neutrality based liberalism is a failed political method

Powell 98. John A. Powell, (John A. Powell leads the UC Berkeley Haas Institute for a Fair and Inclusive Society and holds the Robert D. Haas Chancellor’s Chair in Equity and Inclusion,) As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society, 16 Law & Ineq. 97 (1998), Available at: <http://scholarship.law.berkeley.edu/facpubs/239>. P134-137. NP 3/17/17.

Because it may be impossible or undesirable to escape the narrative of liberalism completely, we examine its ability to actu- ally achieve an authentic justice. There is no simple meaning of liberalism, but many evolving strains. It may be useful to consider Ronald Dworkin's distinction between neutrality-based liberalism and equality-based liberalism. 21 5 The former opposes any limita- tions on personal liberty because of moral skepticism toward the claim that any particular mode of being is better than any other mode. The latter version holds as fundamental the proposition that governments treat all citizens as equals, and insists on moral neutrality only to the extent that this notion of equality permits. Neutrality-based liberalism contains internal flaws which recom- mend against its maintenance. The first, and most obvious flaw, is the conviction that a hands-off approach with regard to personal liberties is somehow "neutral." In fact, this approach permits a form of privileging that denies alternative definitions of liberty, allowing liberty to be confused with license. Second, neutrality-based liberalism provides no moral basis for claims against injustice. Embedded in the idea of a govern- ment which abstains from regulating liberties is the concomitant conviction that the status quo adequately represents the subdivi- sions of social contract. In this way, moral skepticism can produce an uncritical acceptance of dominant narratives, with the implicit suggestion that alternative conceptions lack merit. This leads Dworkin to state that neutrality-based liberalism "is a negative theory for uncommitted people. 216

The consequence of what it might entail to achieve the good for all citizens in a modern society is a subject of considerable de- bate. What is clear, however, is that an assessment of the good re- quires that all citizens be accorded equal opportunity to participate in the discourse of world-making. A concern for membership re- mains one of the defining characteristics of the liberal tradition. There nonetheless exists a gulf between labeling someone as a nominal member of society and giving that member an ownership role in shaping the community's priorities. Without a sense of ownership, there can be no reasonable expectation that the Jones family will be willing to accept the burden of tolerating a cross burning on their yard.224 Only if the Jones family can identify themselves as owners within a community and rightfully perceive themselves as having power to shape their community's values should they be expected to self-identify as members, thus accord- ing tacit approval to the judgment that justice requires their toler- ance of an act intended to convey the message that they are em- phatically not a part of the community. Of course the very purpose and effect of hate speech is to deny and disparage the marginal membership of the less-favored subject. What is at stake when St. Paul prohibits hate speech and racist acts under penalty of criminal sanctions? 225 Opinions such as that of Justice Scalia would have us believe that what is at stake is free speech itself.226 Those who strike down prohibitions on hate speech insist that the Jones family assimilate, accepting the values of the larger society, even as society rejects their capac- ity for ownership. 227 Free speech is not at stake; what is at stake is a particular application of a particular notion of equality. This is the notion of equal individual rights before the state, understood as a limitation on the state's power to restrict expression. Rather than characterize the debate over regulation of racist speech as one of liberty versus equality, we should characterize it as one concerning "domains of equality."228 "[D]omains of equality refers to the classes of things that are to be allocated equally."229 This definition begs the question of why certain classes of things, and not others, are to be allocated equally. I have suggested that the breadth of a particular domain of equality may be ascertained by reference to the endured experience of participants in a demo- cratic society. The expansiveness or narrowness in a particular domain of equality exists at a level of abstraction of a degree less than that underpinning all of liberal theory. Instead, the notion of breadth queries whether justice requires that we move beyond the narrowest possible construction of equality. In any event, these questions exist prior to any confrontation with liberty claims. That is, a narrow conception of equality will obviously be less com- patible with regulation of speech than will a more expansive defi- nition.230 Of course, this raises the question of why a more expansive notion of equality is appropriate. In this Article, I have pos- ited that justice and participation are the values that should in- form this question. Such an inquiry is a programatic and experi- ential question as well as a normative one.231

### Fichte

Fichte in the last year of the old darkness. Reclamation of the Freedom of Thought from the Princes of Europe, Who Have Oppressed It Until Now. Originally published anonymously in Danzig in the spring of 1793. The place and date of publication were given as "Heliopolis in the last year of the old darkness." NP 3/12/17.

## Lieberman

#### Turn: Alt-right hate speech on campus galvanizes the movement, serving as a gateway to more bigotry. Lieberman 17,

Dan Lieberman. "Milo Yiannopoulos is trying to convince colleges that hate speech is cool." February 2, 2017. www.cnn.com/2017/02/02/us/milo-yiannopoulos-ivory-tower/

But some students who end up as the targets of Yiannopoulos's comments feel there should be no place for him or his views on campus. A transgender UC Davis student, who asked to be identified only as Barbara, told CNN she was too scared to be on campus during Yiannopoulos's scheduled visit and was fearful of his potential effect on her classmates. "The fear is with the folks who are gonna see him," she said. "He leaves. But the folks who are attending (his event) are the folks that I have to sit next to in classrooms." **Yiannopoulos isn't the only controversial speaker to try and capitalize on** what some are describing as a **"hate speech as free speech"** movement. **Spencer, the white nationalist,** told Mother Jones **that watching one of Yiannopoulos's speeches** at the University of Houston in September **was a "huge inspiration" and helped him realize "**what we are doing is known to people, **it's edgy** and dangerous**, it's** cool and **hip.** It's that thing our parents don't want us to do." Spencer spoke at Texas A&M University in December and says **he's planning to do his own college tour.** Nathan Damigo, another white nationalist and founder of a group called Identity Europa, says he's hoping to join Spencer on the tour. Damigo says he also sees Yiannopoulos as an inspiration and showed up at his event at UC Davis before it was canceled, hoping to find potential recruits for his own cause. "In a way, **we're all trying to do the same thing**," Damigo told CNN. "We're all trying **to bring narratives to these institutions that have been** intentionally **omitted.** We are trying to combat the (liberal) narratives here that are just being allowed to propagate here without any sort of confrontations." For his part, Yiannopoulos says he has nothing to do with Spencer or any white nationalists. "I don't have unsavory opinions about skin color ... what you are seeking to do, by associating me with people who have odious and disgusting opinions, is suggest that I somehow in some way tacitly enable these people," he said. "I don't. F\*ck you." But Oren Segal, director of the Anti-Defamation League's Center on Extremism, believes **Yiannopoulos "serves as a gateway" to more dangerous ideas.** "When you see white supremacists hanging outside of Milo's events to poach potential recruits, it speaks to exactly why Milo is potentially dangerous. **Milo is bringing his** misogyny and **hatred** and racism **onto campus, and people (are)** sort of maybe **considering it,** 'Oh, this is just ironic. He's just being -- you know, pushing the envelope.'" Segal said. "And so **it enables his ideology,** his messages to sort of seep in. **The next level is** maybe an openness to **more white supremacist ideas,** more hardcore believers. I think that's fundamentally dangerous." But Yiannopoulos said he doesn't believe his statements are that far from the mainstream. He sees himself as a crusader for free speech. "I have opinions that, frankly, a lot of people are thinking. They just won't tell people. They don't pollsters. They don't tell journalists. But they think it, which is why you're all so surprised when, you know, half the country voted for Trump. I hold perfectly respectable, reasonable opinions that half of America agrees with," he said. "So long as people are prevented from saying true things in public life for political correctness, there'll still be a need for me," he said. "And I'll never stop."

## Poel

A2 Not a controlled experiment

The purpose of real-world experiments is not causal relations. Poel 15,

Poel writes: Poel, Ibo van del. Professor, TU Delft “Morally Experimenting with Nuclear Energy.” Cambridge University Press, August 2015.

It might, however, be objected that the new criterion might help us to distinguish real-world experiments from mere observations, but that the uncontrolled character of real-world experiments nevertheless makes it impossible to learn from these experiments. After all, scientists aim for controlled experiments because they make it possible to establish cause-effect relations. I think **this possible objection does not hold** for several reasons. **First, the learning that takes place in real-world experiments is not only,** or even primarily, learning **about causal relations.** As pointed out earlier, **in real-world experiments one can learn about social impacts** (impact learning), **about** the proper institutions to embed a technology in society (**institutional learning**)**, and** about **relevant moral issues,** norms, and values (normative learning). Institutional and normative learning in particular do not necessarily require the establishment of causal relations. Second, the learning in a real-world experiment is primarily aimed at better introducing a technology in society rather than at producing general knowledge about cause-effect relations (as is often the aim of laboratory experiments). When we introduce a new technology in society as a real-world experiment, we want to learn about this specific technology in a more or less specific context. A real-world experiment is in fact often more appropriate for this kind of learning than a laboratory experiment.

## Kellogg

#### Hobbes misses the constant need to adjust in a process of inquiry- legal intelligence must be pragmatic. Kellogg 10,

Kellogg, Frederic R., Hobbes, Holmes, and Dewey: Pragmatism and the Problem of Order (August 8, 2010). Available at SSRN: https://ssrn.com/abstract=1655307 or http://dx.doi.org/10.2139/ssrn.1655307

**What is missing from Hobbes’s view is the constant need for continuous adjustment in any real scheme of social ordering.** It is this that I refer to as **the dynamic order characteristic of pragmatism,** the transactional and transformative aspect of inquiry found in Dewey’s work. **The logic of the law is not the a priori dictate of legal reason but rather,** paraphrasing Dewey, **the product of inquiry.** The dimension highlighted in retrospect through Holmes is the element of constant conflict as a catalyzing force. As Ralph Sleeper notes, Peirce’s doubt-belief formula directed Dewey’s attention to the actual processes of thought. Inherently vague, the idea of doubt has always sought specificity in Dewey’s work. For Sleeper the key to Dewey’s logic was understanding inference “as a real event of transformational force and power, causally real in the emergence of new features of things ‘entering the inferential function.’ It takes inference as action, as behavior that causes changes in reality through interaction with things.” (1986, 83). If the real process of inference begins with doubt, the doubt-belief formula needs to acknowledge that doubt is not merely spectral but must have its own physiology and history. From Holmes we gain the insight that **legal intelligence is a special case of inference deriving from constant controversies that find their way into the judicial system. Doubt is palpable in the difficult case.** The gradual hammering-out of belief through case-specific resolutions is visible in the record of litigation. Flawed and chaotic though it may be, **the resolution of conflict by legal problem-solving provides a written record of** naturalistic and **pragmatic ordering, revealed in its full flawed and chaotic nature.** This aspect of knowledge needs to be recognized equally in relation to the dynamic growth of universals and ideals. In an address given to the New York State Bar Association in 1899, Holmes summarized this point in a way that Dewey must have appreciated: It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. (1899, p. 212) This extraordinary passage demonstrates that Holmes saw law entirely differently from Hobbes. Rather than an autonomous force suppressing conflict as pathological, it is embedded within the social processes assimilating and meliorating conflict as a natural condition. Rather than viewing legal and political theory as a prophylactic program for a discrete governing entity, legal theory is cognate with the rest of knowledge and law is viewed as a written record offering evidence of social norms and ideas as continuously cogenerated. Ideals are products of this view of knowledgeas-inquiry, and they are constantly developing in response to the changing nature of the human endeavor.

# Simon 16

Ceclilia Capuzzi Simon. "Fighting for Free Speech on America's Campuses." August 1, 2016. The New York Times. Education Life. <https://www.nytimes.com/2016/08/07/education/edlife/fire-first-amendment-on-campus-free-speech.html>.

#### The majority of students favor speech codes. Simon 16,

**A 2016 Gallup survey** bears out his concerns. • **Asked if colleges should have policies against slurs and** other intentionally **offensive language, 69 percent of students said yes,** while 27 percent believed they should be able to restrict expression of potentially offensive political views. And **63 percent wanted schools to restrict costumes that stereotype** racial or ethnic groups. • While 76 percent agreed that students should not be able to prevent the news media from covering campus protests, nearly half supported reasons for curtailing that coverage: biased reporting (49 percent), the right to be left alone when protesting (48 percent) and the right to tell their own story on the internet and social media (44 percent). For black students, percentages are higher (66 percent, 61 percent and 54 percent). • Black students were least sanguine about the right to peaceable assembly: 60 percent saw it as threatened, compared with 29 percent of white students. • Over all, 54 percent polled said the climate on their campus “prevents some people from saying things they believe because others might find them offensive.”

Other random polls:

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#### Title IX statutes are overly broad causing misapplication. Simon 16,

Just ask Teresa Buchanan, who was fired from her tenured position as an associate professor of education at Louisiana State University. FIRE is subsidizing her suit against the university, filed in January. Ms. Buchanan, who had taught at L.S.U. for two decades, had been approved for promotion to full professor. But several students complained that she had an abrasive and disparaging style, used profanity and sexual slang in the classroom, and made off-color jokes — one, about how quality of sex gets worse the longer the relationship. Ms. Buchanan described herself as blunt, and called her language and humor a “pedagogical strategy” to toughen up future teachers for work in communities where such language and hostile interactions are common. But L.S.U. fired her, saying she had violated its sexual harassment policy, though students had not accused her of that. The university, citing Department of Education advisements regarding Title IX, maintains it is following the law. Ms. Buchanan’s suit cites violations of freedom of speech rights and due process. But her case, said Robert Corn-Revere, a high-profile lawyer who works with FIRE’s litigation program, is also about “the bigger picture — the widespread use of Title IX to violate First Amendment rights.” Title IX prohibits discrimination based on sex in federally funded educational programs. In the last five years, as the government has worked to crack down on sexual assault on campus, it has broadened the definition of sexual harassment to “any unwelcome conduct of a sexual nature” and eliminated a protection that such conduct had to be offensive to a reasonable person. In April, the Justice Department cemented the definition in a letter to the University of New Mexico, which was under investigation for Title IX violations, said Will Creeley, FIRE vice president of legal and public advocacy. The letter, which faults the university for lacking proper channels to report sexual harassment and sexual assault, could have significant implications: It makes clear that any complaint of a sexual nature — say, someone finds offense in an overheard Amy Schumer joke — must be investigated even if no one claims it created a “hostile environment,” a threshold set by the Supreme Court. This “invites censorship,” Mr. Creeley said. The University of New Mexico president, Robert G. Frank, agreed that universities had a responsibility to maintain an atmosphere free of verbal sexual harassment. But the federal government, he said in an email, “offers no specific guidance” on how to do that “in the real world without infringing on free speech,” especially at universities where “the exchange of controversial or sensitive ideas is woven into the fabric of academe.” Universities investigated for violations of Title IX, or those that do not adequately investigate charges of sexual assault or harassment, face lengthy and expensive investigations — 246 cases are currently under investigation at 195 campuses. Those found guilty, public or private, could lose federal funding. Understanding Title IX, Mr. Lukianoff said, “is not sexy and it’s complicated, but it is the secret engine as to why universities overreact” in creating and enforcing speech codes and in charges of harassment or sexual assault. “When people say, ‘Look how crazy our universities have gotten,’ they need to understand that they are being pushed with a very scary threat,” he said. “They’re not just scared of loss of funding. They’re scared of the investigations.” Colleges and universities, he said, are being “asked to do the impossible.”

# Schallhorn 17

Kaitlyn Schallhorn. "Team Trump meets with national college organization to talk free speech." January 13, 2017. The Blaze. [www.theblaze.com/news/2017/01/13/team-trump-meets-with-national-college-organization-to-talk-free-speech/](http://www.theblaze.com/news/2017/01/13/team-trump-meets-with-national-college-organization-to-talk-free-speech/).

Trump is supportive of efforts to dismantle speech codes. Schallhorn 17,

**Senior members of** President-elect Donald **Trump’s** transition **team met** with the head of a conservative student group this week **to discuss** free speechissues, Young Americans for Liberty Executive Director Cliff Maloney Jr. told TheBlaze. Maloney said **the** group discussed YAL’s **nationwide campaign to fight for free speech rights on public college campuses** as well as how the Trump administration will protect the First Amendment. “Based on his previous statements on free speech and freedom of the press, many are worried about First Amendment protections under a President Trump,” Maloney told TheBlaze. “There is no better way to prove the critics wrong by addressing free speech limitations on college campuses.” Maloney said it was the first time he’s personally met with members of Trump’s team and applauded the president-elect for seeking “out a coalition of young minds to bring in new ideas into the administration.” He also noted that **the** transition **team was “very receptive” toward** YAL’s **[the] campaign to eradicate free speech blocks on college campuses.** Groups such as YAL and the Foundation for Individual Rights in Education often go to war with public universities over what they see as the stifling of free speech — which include speech zones, banning student clubs because of a political affiliation or barring controversial speakers or events from campus.

# Godrej 14

Godrej, Farah. "Neoliberalism, Militarization, and the Price of Dissent: Policing Protest at the University of California." In The Imperial University: Academic Repression and Scholarly Dissent, edited by Piya Chatterjee, and Sunaina Maira. University of Minnesota Press, 2014. Minnesota Scholarship Online, 2015. doi: 10.5749/minnesota/9780816680894.003.0005.

The neoliberal logic entailed in the privatization of the University of California is, I have argued, necessarily interlinked with the logic of militarization and the criminalization of dissent, because it employs a militarized enforcement strategy, coupled with a political rhetoric that criminalizes the specific behaviors involved in protest and dissent against these strategies. The militarization of the university campus is thus not simply a reflection of the increasing militarization of American law enforcement based on the logic of ongoing threats to public safety encoded in years of the War on Drugs and the War on Terror.25 Rather, such militarization is one prong of a necessary enforcement strategy designed to convey that dissent against privatization is meant to be costly in inflicting various forms of legitimized violence upon those who dissent. The second prong of the enforcement strategy also conveys that dissenters will pay a high price by being criminalized, either through rhetoric that paints them as violent and therefore marginal, unworthy, and undesirable in the public imagination or through legal machinations that force them to expend tremendous financial resources on extricating themselves from prosecution. The language of cost and price here, of course, reminds us of the ongoing hegemony—and perhaps victory—of the conceptual frameworks of neoliberalism and its theoretical accompaniments, such as rational choice theory, predominantly featured in neoclassical economics. These strategies of criminalization and militarization rest on sending signals to adversaries, encoded precisely in these languages, wherein value and worth are measured in terms of indicators such as price or cost, and rational actors are assumed to be guided by a universally comprehensible incentive structure. Thus the strategies of criminalization and militarization rest on de-incentivizing dissent, so to speak, assuming that dissenters will measure the costs inherent in their actions and choose rationally to cease from engaging in such dissent. The continued insistence on dissent is therefore resistance to the logic of (p.141) neoliberal privatization on multiple levels: it not only calls out the complicity of the university with the neoliberal state and the forces of private capital but also continues to dissent despite the “incentives” offered in exchange for desisting from dissent. And in so doing, it should be signaling its rejection not simply of privatization but of the entire conceptual baggage of neoliberalism, including its logics of rational choice, cost, price, and incentive, as well as its logic of structural violence. In other words, the ongoing struggle against the logic of neoliberal privatization requires that dissent continue, despite its high “price.”

In this chapter, I argue that the neoliberal logic of private capital at work in the privatization of the University of California is necessarily intertwined with the logic of militarization and the criminalization of dissent. I will argue that the deliberate and systematic privatization of one of the nation’s greatest public education systems engenders—and in fact requires—a militarized enforcement strategy that relies on criminalizing those who dissent and on being able to engage in legitimized violence against such dissenters as and when necessary. The enforcement of the tuition hikes, budget cuts, and other so-called austerity measures at the heart of the privatization strategy is an irreducibly political project, not simply because it relies on a rhetorical political strategy that cleverly assigns responsibility for privatization to recalcitrant state legislators who insist on state disinvestment in public education rather than to those elites within the UC leadership who stand to benefit from such privatization. It is political and politicized in a much deeper sense in that it is able to plausibly and powerfully squash all public dissent from this plan by casting those who dissent against its neoliberal logic as criminal, ensuring that the “price” of their dissent—whether in terms of violence, jail time, or simply public stigmatization—is high enough to discourage further dissent. It uses the legal-political resources of the neoliberal state and replicates the neoliberal state’s complicity with private capital in order to build political legitimacy for its repression of dissenting views. The basic premise of my chapter—that the leadership of the University of California has since 2009 been committed to the deliberate and systematic privatization of one of the nation’s premier public education systems—should not be in question. This plan involves being complicit with the state’s disinvestment in public education and shifting the burden of payment for education from society to individual students. The effect of this shift hits the (p.126) least privileged the hardest, so that the accessibility and affordability of this education is eroded, particularly for those who are least able to afford this burden. Access to education in this system is now meant to require one of two routes: already having the wealth and privilege to pay the exponentially multiplied fees or taking on unimaginable amounts of student debt in order to do so, which in turn provides profitable investments for banks. The outcome of this deliberate plan is to further widen the already massive inequalities of income so as to reinforce existing privileges of race, wealth, class, income, and so forth. Indeed, as Chris Newfield has so convincingly argued, the financial and political crises of public universities are the result of a conservative campaign to end public education’s democratizing influence on American society.1 One of the greatest experiments in democracy, the University of California’s commitment to accessible, affordable public education, had created unprecedented levels of social and economic mobility over the past forty or so years while creating a racially integrated mass middle class. But Newfield skillfully demonstrates how the expansive vision of an equitable America that emerged from the postwar boom in college access has gradually been replaced by the emergence of the antiegalitarian “corporate university,” which contributes to the ongoing erosion of the college-educated middle class. The specifics of the University of California’s strategy of systematic privatization should not require much exploration; vocal critiques by dissenting scholars within the UC system have repeatedly demonstrated that the so-called austerity measures such as tuition cuts, fee hikes, and budget cuts are not to be seen as the somewhat desperate response of a hapless and helpless UC leadership with no other choice in the face of a bankrupt state that insists on disinvestment.2 The convincing choruses of “What else can we do?” constitute the first discursive political victory of the UC leadership, ensuring that the state is seen as the political problem and that the leadership’s own abdication of responsibility for forcefully and publicly advocating for public education is utterly occluded. Indeed, what is occluded above all is the fact that privatization, rather than being a necessary evil, comes about as the result of deliberate complicity with—and in fact advocacy of—neoliberal disinvestment in the concept of education as a public good by the very people charged with protection and disbursement of this public good. And consequently, education is systematically reframed as a private good existing in the sacred neoliberal realm of individual choice, something therefore to be commodified and paid for by those who have the resources. But it is crucial (p.127) to recall that such reframing is the result of a rhetorical strategy by precisely those who would profit from this commodification and privatization. However, in order to be able to enforce the tuition hikes, budget cuts, and other “efficiency” and “austerity” measures at the heart of this privatization strategy, the UC leadership has relied on a concomitant strategy of plausibly and powerfully squashing all public dissent from this plan. I argue here that the enforcement strategy has two distinct but interrelated components. First, it uses a militarized police force in order to inflict injury and violence upon any protesters. Second, it engages in the deliberate and systematic criminalization of all dissent that arises in opposition to this plan. The two components are of course intertwined, for the one requires the other: all violence inflicted on a dissenting public must be legitimized and justified as a necessary measure in the public’s own interest to maintain law and order against ostensible criminal threats. Together, these combined elements of militarization and criminalization are designed to ensure that the price of protest is so high that dissent against the privatization strategy becomes prohibitively expensive. The neoliberal language of “price” and “expense” here is of course intentionally multivalent. It includes the literal “price” in terms of financial cost of ensuing legal battles but also refers to the cost of being labeled as a criminal in the public imagination or of suffering injury by police forces. The higher these costs, the more those involved in dissent are incentivized into silence through a carefully constructed chilling effect on all forms of speech and action that criticize, protest, or dissent against the privatization plan. Militarization The UC protests against privatization predated both the Arab Spring and the Occupy Wall Street movements, beginning as early as 2009 in response to the UC leadership’s commitment to the systematic privatization of the system along with its implicit support for the state’s disinvestment in public education. By 2011, however, the moral outrage of dissenters within the UC system was largely aligned with that of the emerging Occupy movement, itself in turn inspired by the Arab Spring. Despite the obvious differences among these movements—with the Arab Spring focused specifically on the critique and removal of undemocratic military dictatorships and repressive neoliberal regimes—both movements share, in Anne-Marie Slaughter’s words, the “same fundamental drivers: a deep sense of injustice and invisibility.”3 Dissenters within the UC system, like their counterparts (p.128) in the Occupy movement and elsewhere, expressed public anger at the increasing power of private capital, the impunity with which it operated in enriching its own profit-making agents while impoverishing the vast majority of citizens, and the state’s collusion with the self-enriching power of capital through increasing disinvestment in public services such as health care and education. And the tactics of expressing such dissent were remarkably similar in both the Occupy movement and the movement in support of public education, which involved the occupation of public spaces such as university campuses, parks, or other areas surrounding seats of local government, along with the traditional markers of nonviolent protest such as chanting, singing, sitting-in, raising slogans both verbal and pictorial, and generally drawing attention to the injustice of the overarching framework of racial and socioeconomic inequity that framed the lives of the protesters. In a few cases, the protesters engaged in specifically disruptive yet nonviolent action such as blockading the entrance to a bank or refusing to allow officials to leave a building. Across the board, the movements were mostly avowedly peaceful and nonviolent in both symbolic intent and actual practice, although, as we will see later, there were some exceptions to this. It is therefore perhaps all the more worth noting that each of these movements was ultimately met with a violent, militarized force deeply disproportionate to its peaceful character, while the respective authorities engaged in dispersing these protests justified this militarized violence through the use of rhetoric that served to paint its targets as potentially dangerous and threatening. The Occupy encampments were systematically dismantled, throughout winter 2011–2012, by various city mayors employing police and other law enforcement authorities who sometimes manhandled or otherwise violently dragged, slammed, and beat protesters in the course of arresting or handcuffing them. The response to protests at the Davis, Berkeley, and Riverside campuses of the University of California in 2011 and 2012 was rather more dramatically disproportionate. In November 2011, in a series of iconic images that would soon evoke international outrage, police in riot gear armed with assault weapons were recorded pepper spraying, beating, and shoving batons into the stomachs of nonresisting, nonviolent student and faculty protesters occupying the Davis and Berkeley campuses. Two months later, scenes of similarly disproportionate militarized response were seen at the Riverside campus where the UC regents were meeting, ostensibly to discuss another set of tuition hikes and budget cuts in the course of privatization. Protesting (p.129) students and faculty surrounding the location of the regents meeting were faced with police in riot gear and eventually shot with lead paint bullets. While students and faculty chanted; peacefully blockaded a building; and repeated their intent for peaceful, nonviolent expression of dissent, the administration responded with a massive show of militarized force. Police from every UC campus were mobilized and eventually supplemented by officers from the Riverside Police Department and the Riverside County Sheriff’s Department, while helicopters circled overhead and officers took sniper positions at high points on campus buildings, as described in the introduction to this book. Viral videos taken on cell phones showed police pushing fences into crowds of students, shoving batons into the bodies of protesters, slamming heads into the ground, dragging bodies across the ground, and shooting guns loaded with lead paint bullets. Much was of course written and said about the moral illegitimacy of the administrative response in each of these cases. But what is worth emphasizing here is that the militarization of campuses seems crucially linked to the privatization of public universities. UC Santa Cruz professor and former president of the Council of UC Faculty Associations Bob Meister articulates the link between the privatization of public universities, the financial services industry, and the national and global security industry: Since 9/11 the US defense industry of the Cold War has morphed from being mainly in the military hardware business into a new role as global provider of security services that enables government and corporations throughout the world to outsource intelligence, policing, background checks, construction of secure sites and various operations that may need to be deniable—as well as the public relations efforts necessary to support such deniability. Most Americans do not know that there is a huge domestic market for services provided by the defense industry…. The fastest growing market for the defense and security services industry is in the area of local government and public agencies that feel threatened by political protests, such as the Occupy movement, and that have reporting and other obligations under the Patriot Act.4 UC Davis professor and poet Joshua Clover, who was arrested as part of the civil disobedience movement against privatization, goes on to point out that while the specifics of such connections may vary, the systemic logic is clear: (p.130) “Heightened campus security is inextricably linked to heightened campus securitization in its two main forms: the decision of universities to pursue a certain line of investment strategies which move money away from educational services and into capital projects; and the corresponding decision to cover those educational costs by shifting burdens to students at a rate which can only be financed though student loans, concomitantly providing profitable investment for banks laden with otherwise fallow capital. The rise in tuition and indebtedness within the context of economic crisis simply is the militarization of campus; they are one and the same.”5 In other words, to paraphrase UC Davis faculty member and activist Nathan Brown, police brutality is an administrative tool to enforce tuition increases6 precisely because of the link between privatization and militarization. In short, it is no accident that we see the repeated deployment of armored, armed, militarized police forces on campuses where large crowds of students and faculty and staff gather to protest the erosion of the accessibility and affordability of public education. Nor should it have been surprising that in July 2012, the UC Berkeley police department briefly considered the purchase of an armored military tank with grant funds from the U.S. Department of Homeland Security. The UC administration is willing to, able to, and indeed does deploy militarized force in order to make the cost of dissent high. Note that its deployment of both campus police and external police forces makes the neoliberal state complicit in the militarization of these campus spaces. So this is one sense in which it is in the administration’s interest to make sure that the cost of protest and dissent is high. The message is clear that if dissent occurs publicly and collectively, those involved are likely to be pepper sprayed, beaten with batons, shoved to the ground, shot with lead paint bullets, and so forth. It is better, in short, to stay home and silent rather than to participate in such events. The extent to which the UC leadership wants to underscore its encouragement of such silence can be seen in the text of a travel advisory ostensibly issued by the UC Office of the President (UCOP) before May Day protests of 2012. The memo apparently warned UC students, faculty, and staff to avoid all rallies and demonstrations as a precaution and offered “tips for reducing vulnerability,” which include “avoid[ing] all large gatherings,” because “even seemingly peaceful rallies can spur violent activity or be met with resistance by security forces.”7 Furthermore, one is advised to avoid “cities with a large immigrant population and strong labour groups.” If this advice is not followed, the memo offered a glimpse of the violent and militarized response that likely (p.131) awaits: “Bystanders may be arrested or harmed by security forces using water cannons, tear gas or other measures to control crowds.” Members of the UC community that must travel near protests should “dress conservatively … maintain a low profile by avoiding demonstration areas … [and] discussions of the issues at hand.”8 As Mark Levine notes, such advice might well have been offered to a black person in a white neighborhood forty years ago: “Dress well, stay low, don’t talk to strangers, stay clear of the police, and most of all, don’t do anything to draw suspicion to yourself. And for God’s sake, don’t mess with the one per cent.”9 When those tasked with advocating for public education issue such public messages, the thinly veiled warning to dissidents within the UC system is clear: stay away from places with lots of poor immigrants and/or wage-working people, especially those with the nerve to fight for their rights; keep your head down; keep your voice down; don’t cause trouble; and don’t get involved with troublemakers. Or else. Criminalization Part I: Rhetoric I turn now to the second component of the enforcement strategy. The second thing that the UC system needs in order to enforce privatization is the ability to make the cost of dissent high by systematically criminalizing those who protest, speak out, and dissent against privatization. This criminalization takes two forms. The first is a kind of rhetorical criminalization, which we actually saw used most effectively in the nationwide dismantling of Occupy encampments, where city and local officials justified the often violent expulsion of the occupiers with the vague and unsubstantiated threat that such people posed to law and order. The city authorities responsible for authorizing the often violent expulsion of Occupy encampments engaged in forms of rhetoric designed to justify the need for such violent response by casting the protests as potentially threatening and even perhaps criminal, with the idea that the extended occupation of public spaces by citizens (some of whom were unemployed) posed a threat to law and order. While the precise nature of the threat was rarely specified, such justifications often used the rhetorical strategy of linking the presence of protestors to unemployment, bad personal hygiene, the recreational use of alcohol and narcotics, and sometimes sexual predation. The general image evoked was that of dirty people who have no jobs and nothing better to do than to shout loudly about their anger, get drunk, and perhaps prey on innocent women. In the public imagination, it was suggested, such people should be seen as somehow threatening, and (p.132) their loud, angry, and disruptive behavior—along with their somewhat questionable status on the margins of society, as evidenced by the dodginess of their personal bearing and activities and their concentration in large numbers in tents in public places—should be seen as a source of concern. And it is precisely this concern that should rightfully cause city officials to bring in the forces of law and order. The UC leadership’s rhetorical strategy in defense of its own militarized response to various protests was uncanny in its similarity. Perhaps the best example comes from Nathan Brown’s excellent analysis of the Reynoso report, in which UC Davis chancellor Linda Katehi, a month after the pepper spray incident at Davis, offered her explanation of why she had to authorize police presence in order to remove protesters from the Quad: “We were worried at the time about that because the issues from Oakland were in the news and the use of drugs and sex and other things, and you know here we have very young students … we worried especially about having very young girls and other students with older people who come from the outside without any knowledge of their record.”10 To quote Brown, “The best rationale our Chancellor can come up with (after a month’s reflection) for a major police operation against non-violent student protesters is ‘the use of drugs and sex and other things’ in the midst of ‘very young girls’…. In brief, all [she] has to offer in its defense is the danger of sex and drugs, of ‘older people,’ and the terribly frightening specter of ‘Oakland’ [presumably referring to the Occupy Oakland debacle].”11 Indeed, this rationale echoed almost exactly the somewhat absurd logic repeatedly employed by city authorities that the combination of public anger and many bodies in tents and the possible presence of sex and drugs automatically equals a potential threat that must be squashed through a militarized police response. But other rhetorical moves made by UC leadership were rather less laughable and must be taken more seriously in their deliberate intent to criminalize dissent. Perhaps the most infamous was the attempt by UC Berkeley chancellor Robert Birgenau to rationalize the police beating of unarmed and unthreatening students and faculty by claiming that linking arms and forming a human chain in order to prevent police from gaining access to an encampment, as the Berkeley protesters did, was “not non-violent civil disobedience.”12 Indeed, such a discursive strategy, while widely reviled and thus hopefully repudiated (Chancellor Birgenau subsequently resigned, citing personal reasons), was notably never contradicted by anyone in the UC leadership. Meanwhile, its logic rested on the ability to argue that the actions (p.133) of the protesters were loud enough, aggressive enough, confrontational enough, and disruptive enough—even if they were not directly violent—to warrant the violent response. In other words, protesters had provoked or invited police violence simply through the disruptiveness and provocation, and thus the subjectively perceived aggressiveness, of their tactics.13 But what precisely had the protesters done that could be perceived as aggressive, confrontational, disruptive, and thus deserving of violence? Or, in other words, what about their behavior could have plausibly, albeit subjectively, been interpreted as “not nonviolent”? Indeed, a wonderful analysis of these rhetorical strategies in the blog Reclaim UC reminds us that it is precisely the fact that the protesters refused to submit to the commands of the police that placed their actions outside the category of “nonviolence” according to the rationality of the police. The only thing remaining in the realm of the nonviolent, according to this logic, “is the absolute, uncritical obedience to their authority … in short, ‘non-violence’ according to the police means the uncritical compliance with the growing arbitrary power of the sovereign.”14 Similar logic was used in the case of the UC Riverside (UCR) response to the crowd of student and faculty protesters at the regents’ meeting on Riverside’s campus, also mentioned in the opening vignette of this book’s introduction. The administrative response to the hundreds-strong unarmed crowd—chanting peacefully, often using humorous slogans, music, drumbeats, and dance—was to declare the nonviolent assembly unlawful and to issue the command that everyone disperse or otherwise be subject to forcible removal. Through this declarative act, conducted anonymously and without any public justification (the precise responsibility for the declaration of unlawful assembly remains as yet unaccounted for by the UCR administration, despite repeated requests), every single student and faculty member doing nothing other than standing in a public space at a public university was thereby criminalized. When protesters refused to disperse and instead more actively surrounded the location of the meeting, police in riot gear escalated the situation by shoving batons and fences into the bodies of protesters and eventually shooting lead paint bullets at an entirely unarmed crowd. While the UCR leadership subsequently expressed the usual regret for the injury to protesters, at no point did their rhetoric do anything except defend such violence as regrettably necessary by pointing to the threats posed by the angry and active opposition of the protesters. In both a public communiqué to the campus as well as a town hall (p.134) meeting, then UCR chancellor Tim White repeatedly relied on the argument that the protestors were somehow potentially threatening and that they were endangering the safety and security of all present. Despite the existence of multiple videos demonstrating that it was clearly the police in riot gear rather than the unarmed protesters who had escalated the violence, the UCR administration continued to use vague, questionable, and nebulous imagery in order to argue otherwise. At a town hall meeting on March 6, 2012,15 White projected photos of protesters carrying signs, claiming that such signs were potentially injurious. According to White, other photos ostensibly showed students menacing or threatening members of the administration, yet not a single one of these images showed anything other than protesters in various confrontational poses, sometimes expressing anger. No actual violence or threat of violence is seen in any of the photographic or video evidence. Yet the administration continued to rely on vague and unsubstantiated threats to public safety in order to justify bringing in a highly militarized police force and the subsequent escalation of violence. A system-wide review of the various campus responses to protests was then conducted by the UC general counsel and the Berkeley Law School dean at the request of UC president Mark Yudof. Despite the lip service it paid to the importance of “free expression, robust discourse and vigorous debate,” the resulting Robinson-Edley report was even more striking in the discursive gymnastics it produced in order to further widen the scope of the university’s ability to respond to protest with a variety of militarized strategies. It begins by stating that civil disobedience “by definition involves violating laws or regulations, and that civil disobedience will generally have consequences for those engaging in it because of the impact it can have on the rest of the campus community.”16 Thus the report preemptively suggests that offering any resistance whatsoever to any “regulations” (without examining what can fall under the scope of such “regulations”) can be construed as threatening, provocative, confrontational, and potentially violent and thus worthy of whatever “consequences” the campus authorities deem fit. In an echo of the discursive strategies that preceded it, the very presence of militarized forces on campuses is deemed to be beyond question, and at no point do these reports and strategies address the responsibility to curb the largely disproportionate responses that such militarized forces present to unarmed resisting dissenters.17 But if unarmed protesters express any confrontation or active opposition in response to such militarization, then they have perhaps (p.135) automatically declared themselves suspect and even worthy of a violent response. In one fell swoop, the administrative response to campus protest has managed to completely subvert the logic of nonviolent protest, effectively criminalizing all forms of it by focusing on the potentially threatening nature of such protest. If the very refusal to submit to authority, and indeed the moral obligation to actively and confrontationally oppose such authority is at the very core of nonviolent resistance, then reserving the right to construe any such form of active opposition or resistance as threatening (and thus worthy of “consequences”) potentially criminalizes all nonviolent protesters for undertaking the very act that defines nonviolence resistance. And in continuing to insist that civil disobedience can “have consequences” because of its “impact” on a community, these strategies serve to hint darkly that disruptive and confrontational actions that express public anger can be equated with dangerous and potentially threatening behavior, thus justifying a potentially violent response. In invoking this logic, the Robinson-Edley report seems to reserve the right to criminalize protesters for nonviolent behavior if it can be deemed sufficiently oppositional or disruptive. Moreover, leading with the assumption that civil disobedience can have an “impact on a campus” is similar in rhetorical function to the “ticking time bomb” scenario in debates on U.S.-sponsored torture. That is, the question encourages the interlocutor to imagine a hypothetical situation that would justify the use of force and suggests that we use such hypothetical situations as the basis of policy.18 It allows administrators to equate disruptive and potentially embarrassing student behavior with “dangerous” behavior, which requires a police presence—ostensibly for safety. At the same time, it functions to shift critical attention away from the actual use of repressive force, which generally has little or nothing to do with these hypothesized rationales.19 Leading by assuming that civil disobedience requires punishment because of its “impact” seems to leave the door open for a militarized response with no justification other than the vague and unsubstantiated threat of a so-called impact on campus. It should of course be noted that in many of these instances of protest, the behavior of protesters was often disruptive, confrontational, oppositional, and laden with anger. At Berkeley, this meant simply locking arms and the refusal to disperse. But in other cases, protesters refused to allow officials to leave and blockaded exits. Angry and perhaps offensive language was thrown at police officers. The regents’ meeting was occupied by students (p.136) and eventually shut down. Authorities could have responded by recognizing the underlying causes of such expressions of public anger or choosing to recognize their moral underpinnings, even while disavowing those actions that were offensive or perhaps rude. They could even have acknowledged the slipperiness of terms like “violent” or “nonviolent,” recognizing that nonviolent resistance spans a wide variety of different kinds of actions, some of which can be more disruptive, aggressive, and confrontational than others, while clarifying which forms of aggression are worthy of a violent response and which are not. Any of these statements would have fallen within the realm of reasonable moral responses to such situations. Instead, the UC leadership has chosen to adhere to an uncritical, monolithic, and unrepresentative caricature of all confrontational and disruptive methods of resistance as always potentially threatening. Thus the UC leadership’s ability to justifiably criminalize nonviolent dissenters appears to depend on making a convincing argument that anger, disruption, confrontation, and provocation equal danger to public safety. It rests on the ability to argue that dissenting loudly and collectively about the erosion of one’s access to affordable public education makes one a threat to public safety, dangerous enough to warrant a heavily weaponized response in the name of the so-called public. What remains unexamined, of course, is who in particular represents this “public” whose safety is ostensibly at risk in such situations: in a mass e-mail to the UCR community following the regents’ meeting protest, Chancellor White bemoaned the fact that nine of the officers involved in the militarized response—“our coworkers who are police”—received minor injuries. The bloodied knuckles sustained by police officers in the course of shoving batons into the bodies of protesters becomes the justification for the use of force: these very injuries, the e-mail suggests, demonstrate why the police “did need to use force at times … to protect themselves and ensure safety for others.” Such appeals to “public” safety rest on the absurd assumption that if a confrontation between unarmed nonviolent protesters and those ostensibly charged with protecting public safety results in violence, then such violence must somehow be traceable to the party that is disruptive and confrontational yet unarmed rather than to the party that adheres to the most militarized, weaponized, and militant techniques of preemptive repression ever known to humankind. The “public” whose safety requires protection is easily conflated with those who already have legitimately sanctioned weapons at their disposal (thus ostensibly representing and supposedly protecting this public), while disruptive, (p.137) loud, angry, and confrontational yet unarmed protesters are cast as potential criminals. The logic at work in such argumentation is, of course, precisely the post-9/11 logic of the neoliberal state in response to the War on Terror and the PATRIOT Act. This logic rests on convincing us that a nebulous group of potentially dangerous and threatening “others” are “out there,” coming to get us. Accordingly, those charged with protecting our safety and security—who, as it turns out, are the most weaponized, militarized, and militaristic elements of society—need to use force and sometimes suspend civil liberties in order to achieve this. As the bloggers at Reclaim UC have rightly noted, “This takes us to the somewhat self-evident point that the state has successfully instrumentalized and redefined the slippery term ‘violence’ to repress and criminalize various forms of dissent against austerity measures, and to shrink and eliminate established spaces and practices of constitutionally protected forms of political expression.”20 These authors also remind us that such logic follows “the classical expansion of the executive authority of the state, such as, for instance, the 2012 National Defense Authorization Act, passed with a provision that allows for the indefinite detention of terrorism suspects on US land, including citizens, without trial. Much more insidiously, the police operate within the juridical regime of the liberal state, while using interpretive tactics to bend definitions of crime and expand their own power to incriminate dissenting subjects.”21 As David Theo Goldberg notes, “crisis creation, chaos fabrication and management of state terror to fight the projection of terrorism”22 allow states to conduct legitimate violence in the name of so-called civilized citizenry. “That the figure of the ‘violent protester’ has become a trope in the liberal media and a target of condemnation in popular liberal discourse is a direct effect and continuation of the logic of the violent state, masquerading behind the language of peace, order, and safety.”23 It is this same logic that governs the UC leadership’s criminalization of dissent, following the neoliberal state’s “promot[ion] of a new ahistorical stereotype of the ‘violent protester,’ structured around a logic of prejudice, stigma, and exclusion—where violence against protestors appears a priori reasonable and justified.”24 Criminalization Part II: Laws The second form of criminalization evident in the squashing of dissent uses the legal power of the neoliberal state and its complicity with the forces of (p.138) capital to criminalize nonviolent protestors through legal channels. In March 2012, twelve UC Davis students and faculty—including Joshua Clover— were arrested and faced twenty-one misdemeanor charges and up to eleven years in jail for nonviolently blockading the campus branch of U.S. Bank. In early 2012, Clover and the eleven students—now dubbed the “Banker’s Dozen”—had conducted a nonviolent sit-in at the bank office to protest its role in, and profiteering from, the ongoing privatization of public education at UC. The sit-in was designed to draw attention to the problematic nature of the relationship between the banks and the privatizing university. University contracts with banks encourage tuition hikes because banks stand to profit directly from rising tuition while the administration comes to rely on funding from bank contracts. Thus UC Davis’s contract with U.S. Bank was explicitly predicated on the continued shift of funding for education from public to private sources. When the bank was finally forced to close its campus branch office in breach of its contract with UC Davis, it held the university responsible for all costs, claiming they were “constructively evicted” because the university had not responded by arresting the “illegal gathering.” Shortly thereafter, at the behest of the UC Davis administration, the Davis district attorney charged the so-called Banker’s Dozen with twenty counts each of obstructing movement in a public place and one count of conspiracy. If convicted, the protesters would face up to eleven years each in prison and $1 million in damages payable to U.S. Bank. Another case of legal criminalization was in response to a March 29, 2012, meeting of the regents at UCLA, when three students were arrested and manhandled by police, even though they were not disobeying any police orders or resisting in any way. The students were charged with criminal offences, strip-searched, and, even more onerously, forced to post bail in excess of $10,000 each, which necessitated their raising $6,000 to pay the fees for their bonds. All three students had previous records of having engaged in civil disobedience at other times and were thought to have been targeted for this reason. UC president Mark Yudof is on record as having thanked the officers who conducted their arrest. Despite the subsequent dismissal of all charges by the San Francisco district attorney, the bond money posted by the students was not recoverable. At the regents’ meeting protest at UCR in January 2012, Ken Ehrlich, a lecturer from the UCR art department, also known to have been involved in previous instances of public protest against privatization, was assaulted by several police officers, subsequently charged with felony assault, and held on (p.139) $25,000 bail. Witnesses say that at the time of his arrest, Ehrlich was doing nothing other than holding a protest sign in the shape of a book. A video of the protest shows Ehrlich being pushed into the police line and then being slammed to the ground and dragged across the pavement by police. Although all charges were subsequently dropped, Ehrlich was forced to raise funds for his legal defense in the interim, money that is yet again not refundable or recoverable. These and other instances of legal criminalization demonstrate clearly the collusion between university and state authorities in defense of private capital. In instances where the university does not directly criminalize its own faculty and students, it appears to encourage and even assist the state’s legal authorities to act against those who threaten the systemic logic of privatization and neoliberalism. Even when charges are subsequently dropped and protestors pay no price in terms of their criminal records, they are left with the literal cost of financing their own bail or legal defense to the tune of thousands if not millions of dollars. Dissent is literally made to be prohibitively expensive. In contrast to the public rhetoric and discursive strategies addressed in the previous section, we see here that the university uses a strategy that calls upon the legal resources and mechanisms of the state to replicate the state’s hostility to dissent against privatization and neoliberal disinvestment in public services. What is particularly clever about such a strategy is its delivery of threats without the use of speech or discourse. The discursive message is indeed that those who do not keep their heads low and their mouths shut will be made to pay a high price, quite literally. But this threatening message is never actually spoken. Rather, it is conveyed through the use of legal prosecution in which the university itself never seems to be directly involved but is always lurking in the shadows, always willing to comply with and support—if not encourage—such prosecution against dissenters.

# Oparah 14

Oparah, Julia C. "Challenging Complicity: The Neoliberal University and the Prison-Industrial Complex." In The Imperial University: Academic Repression and Scholarly Dissent, edited by Piya Chatterjee, and Sunaina Maira. University of Minnesota Press, 2014. Minnesota Scholarship Online, 2015. doi: 10.5749/minnesota/9780816680894.003.0004.

As schools censor knowledge, they form ties to the prison-industrial complex. Oparah 14,

This chapter suggests that our analysis of the relationship between the academy and U.S. imperialism would benefit from an examination of new regimes of mass incarceration and their imbrication within the fabric of institutions of higher education. I argue that a symbiotic relationship has arisen between the academy and the “prison-industrial complex”—a conglomeration of state surveillance and punishment machinery—and corporate profit making that has emerged as a response to the rising numbers of “refugees” displaced by and troubling to global economic and political elites. I argue that transnational technologies of mass incarceration are a key weapon used by contemporary imperial regimes to control marginalized populations and suggest that effective anti-imperialist scholar activists need to pay greater attention to the challenges and complicities posed by this hidden alliance between higher education and the transnational prison-industrial complex. The chapter identifies four ways that carceral dependency ties the university to the political economy of prisons. Finally, I reflect on the challenges of decoupling these dangerous complicities and explore what it would mean to work toward the abolition of the academic-military-prison-industrial complex. 2012: Students and faculty meet in the student union of Atkins College,1 a West Coast liberal arts college, to read excerpts from Arizona’s “banned books”—books removed from public school classrooms in the wake of the passage of Arizona State Legislature 15–112, a measure designed to eradicate Mexican American studies from publicly funded schools.2 Transcending hierarchies between paid staff and students, those gathered commit to working in solidarity with organizers in Arizona to challenge the state’s (p.100) censorship of antiracist scholarship. Two weeks later, queer and transgender antiprison activists at a gathering in the same room share a radical analysis of the interconnections among gender policing, racism, and criminalization and encourage the audience to get involved in local struggles against the racialized surveillance and punishment of bodies that transgress narrow gender norms.

Free speech EXPOSES invisible power abuses and checks back oppressors. DOING NOTHING IS DOING SOMETHING; ACTIVE ENGAGEMENT is key to avoid complicity with injustice. Oparah 14,

If anti-imperialist scholars are to heed APMC’s call to develop a multifaceted analysis that simultaneously addresses militarism and prisons, then our critical interrogations of the imperial university must make visible its reliance on and contributions to the prison-industrial complex. Elsewhere, I have argued that universities and colleges educate a global knowledge elite who will become the “prison wardens”—literally and metaphorically—of the nonuniversitied majority and produce technological advances that permit the use of incarceration on a massive scale as a solution to the social ills and unrest caused by the globalization of capital and military repression worldwide.28 While this critique remains pertinent, the widespread use of policing and repression against students involved in Occupy protests and other expressions of dissent against neoliberal attacks on students and workers is a reminder that enrollment in an elite institution of higher education is no guarantee of protection. Students who choose not to ally themselves (p.109) with the priorities of ruling elites or to adhere silently to the strictures of “patriotic correctness” but instead confront the neoliberal state can quickly be removed from their positions of privilege and rendered part of the “criminal class.”

In fact, critique from WITHIN the academy draws attention to neoliberal injustice – empirics prove. Oparah 14,

What Henry Giroux calls the “corporatization of academia” has also embedded higher education in the political economy of prisons.36 In 2001, student activists working with the national campaign, Not with Our Money—Students Stop Prisons-for-Profit, drew attention to the connections between the private prison industry and the privatization of services on campus. After learning that Sodexho Marriott, a leading provider of contracted food services in colleges and universities across the country, was a subsidiary of Sodexho Alliance, a Paris-based multinational corporation that at the time owned more than 10 percent of Corrections Corporation of America, students organized an effective series of local campus campaigns leading to the cancellation of contracts in a number of schools. The Sodexho campaign revealed only the tip of the iceberg. With both prisons and higher education institutions outsourcing services from food and health care to security, it is more and more difficult for schools to find suppliers that are not invested in the military-prison-industrial complex.

Further, freedom to speak out is the FIRST MOVE towards radical new knowledge production. Oparah 14,

In my earlier work on the academic-prison-industrial complex, I suggested that activist scholars were producing and disseminating countercarceral knowledge by bringing academic research into alignment with the needs of social movements and interrogating and reorganizing relationships between prisoners and researchers in the free world.50 Given the history of epistemic and physical violence and exploitation of research subjects by the academy, such a reorganizing of relationships and accountabilities is clearly urgently needed. Yet no matter how radical and participatory our scholarship is, we ultimately fail to dismantle the academic-military-prison-industrial complex (academic-MPIC) if we address it only through the production of more knowledge. Since knowledge is a commodity, marketed through books, articles, and conferences as well as patents and government contracts, the production of “better,” more progressive or countercarceral knowledge can also be co-opted and put to work by the academic-MPIC. An abolitionist lens provides a helpful framework here. Antiprison scholars and activists have embraced the concept of abolition in order to draw attention to the unfinished liberation legislated by the Thirteenth Amendment, which abolished slavery “except as a punishment for a crime.”51 Abolitionists do not seek primarily to reform prisons or to improve conditions for prisoners; instead they argue that only by abolishing imprisonment will we free up the resources and imagine the possibility of more effective and less violent strategies to deal with the social problems signaled by harmful acts. While early abolitionists referred to themselves as prison abolitionists, more recently there has been a shift to prison-industrial complex abolitionism to expand the analysis of the movement to incorporate other carceral spaces—from immigrant detention centers to psychiatric hospitals—and to emphasize the role of other actors, including the police and courts, politicians, corporations, the media, and the military, in sustaining mass incarceration.52 How does an abolitionist lens assist us in assessing responses to the academic-MPIC? First, it draws our attention to the economic basis of the academic-MPIC and pushes us to attack the materiality of the militarization and prisonization of academia rather than limiting our interventions to the realm of ideas. This means that we must challenge the corporatization (p.116) of our universities and colleges and question what influences and accountabilities are being introduced by our increasing collaboration with neoliberal global capital. It also means that we must dismantle those complicities and liberate the academy from its role as handmaiden to neoliberal globalization, militarism, and empire. In practice, this means interrogating our universities’ and colleges’ investment decisions, demanding they divest from the military, security, and prison industries; distance themselves from military occupations in Southwest Asia and the Middle East; and invest instead in community-led sustainable economic development. It means facing allegations of disloyalty to our employers or alma maters as we blow the whistle on unethical investments and the creeping encroachment of corporate funding, practices, and priorities. It means standing up for a vision of the liberal arts that neither slavishly serves the interests of the new global order nor returns to its elitist origins but instead is deeply embedded in progressive movements and richly informed by collaborations with insurgent and activist spaces. And it means facing the challenges that arise when our divestment from empire has real impact on the bottom line of our university and college budgets.

And EVEN IF free speech doesn’t completely stop neolib, it plants the seeds for new possibilities. Working within the academy is key to transforming it. Oparah 14,

Andrea Smith, in her discussion of native studies, has argued that politically progressive educators often adopt normative, colonial practices in the classroom, using pedagogical strategies and grading practices that reinscribe the racialized and gendered regulation, policing, and disciplining that PIC abolitionists seek to end.53 In this sense, there could be no “postcarceral” academy. Certainly, sanctions for undergraduate and graduate students and faculty who challenge the university’s regular practices—from failing grades and expulsions to tenure denials and deportation—are systemically distributed, along with rewards for those who can be usefully incorporated. Yet universities and colleges also hold the seeds of a very different possible future, evoked, for example, by the universal admissions movement or by student strikes in Britain and Canada that demand higher education as a right, not a privilege of the wealthy. Rather than seeking to eradicate or replace higher educational institutions altogether, I suggest that we demand the popular and antiracist democratization of higher education. The first step toward this radical transformation is the liberation of academia from the machinery of empire: prisons, militarism, and corporations. Speaking of abolishing the white race, Noel Ignatiev argues that it is necessary for white people to make whiteness impossible by refusing the invisible benefits of membership in the “white club.”54 Progressive academics are also (p.117) members of a privileged “club,” one that confers benefits in the form of a paycheck, health care, and other fringe benefits; social status; and the freedom to pursue intellectual work that we are passionate about. But we can also put our privilege to work by unmasking and then unsettling the invisible, symbiotic, and toxic relationships that constitute the academic-MPIC. Decoupling academia from its velvet--gloved master would begin the process of fundamental transformation. Without unfettered streams of income from corporations, wealthy philanthropists, and the military, universities and colleges would be forced to develop alternative fund--raising strategies, relationships, and accountabilities. Can we imagine a college administration aligned with local Occupy organizers to protest the state’s massive spending on prisons and policing and demand more tax money for housing, education, and health care? Can we imagine a massive investment of time and resources by university personnel to solve the problem of how to decarcerate the nation’s prisons or end the detention of undocumented immigrants in order to fund universal access to higher education? Can we imagine a university run by and for its constituents, including students, kitchen and garden staff, and tenure-track and adjunct faculty? These are the possibilities opened up by academic-MPIC abolition.

# Chomsky 16

Aviva Chomsky. "Students vs. neoliberals: The unreported conflict at the heart of our campus culture wars." May 25, 16. Salon. Originally from Tomdispatch.com. www.salon.com/2016/05/25/students\_vs\_neoliberals\_the\_unreported\_conflict\_at\_the\_heart\_of\_our\_campus\_culture\_wars\_partner/.

The student movement that has swept across the nation has challenged colleges and universities on the basics of their way of (quite literally) doing business. The question for these institutions now is: Can student demands largely be tamed and embedded inside an administration-sanctioned agenda that in no way undermines how schools now operate in the world? Feminist theorist Nancy Fraser has shown how feminist ideas of a previous generation were successfully “recuperated by neoliberalism” — that is, how they were repurposed as rationales for greater inequality. “Feminist ideas that once formed part of a radical worldview,” she argues, are now “increasingly expressed in individualist terms.” Feminist demands for workplace access and equal pay have, for example, been used to undermine worker gains for a “family wage,” while a feminist emphasis on gender equality has similarly been used on campus to divert attention from growing class inequality. Student demands for racial justice risk being absorbed into a comparable framework. University administrators have found many ways to use student demands for racial justice to strengthen their business model and so the micro-management of faculty. In one case seized upon by free-speech libertarians, the Brandeis administration placed an assistant provost in a classroom to monitor a professor after students accused him of using the word “wetback” in a Latin American politics class. More commonly, universities employ a plethora of consulting firms and create new administrative positions to manage “diversity” and “inclusion.” Workshops and training sessions proliferate, as do “safe spaces” and “trigger warnings.” Such a vision of “diversity” is then promoted as a means to prepare students to compete in the “global marketplace.”

There are even deeper ways in which a diversity agenda aligns with neoliberal politics. Literary theorist Walter Benn Michaels argues, for example, that diversity can give a veneer of social justice to ideas about market competition and meritocracy that in reality promote inequality. “The rule in neoliberal economies is that the difference between the rich and the poor gets wider rather than shrinks — but that no culture should be treated invidiously,” he explains. “It’s basically OK if economic differences widen as long as the increasingly successful elites come to look like the increasingly unsuccessful non-elites. So the model of social justice is not that the rich don’t make as much and the poor make more, the model of social justice is that the rich make whatever they make, but an appropriate percentage of them are minorities or women.” Or as Forbes Magazine put it, “Businesses need to vastly increase their ability to sense new opportunities, develop creative solutions, and move on them with much greater speed. The only way to accomplish these changes is through a revamped workplace culture that embraces diversity so that sensing, creativity, and speed are all vastly improved.” Clearly, university administrators prefer student demands that can be coopted or absorbed into their current business model. Allowing the prevailing culture to define the parameters of their protest has left the burgeoning Millennial Movement in a precarious position. The more that students — with the support of college and university administrations — accept the individualized cultural path to social change while forgoing the possibility of anything greater than cosmetic changes to prevailing hierarchies, on campus and beyond, the more they face ridicule from those on the right who present them as fragile, coddled, privileged whiners. Still, this young, vibrant movement has momentum and will continue to evolve. In this time of great social and political flux, it’s possible that its many constituencies — fighting for racial justice, economic justice, and climate justice — will use their growing clout to build on recent victories, no matter how limited. Keep an eye on college campuses. The battle for the soul of American higher education being fought there today is going to matter for the wider world tomorrow. Whether that future will be defined by a culture of trigger warnings and safe spaces or by democratized education and radical efforts to fight inequality may be won or lost in the shadow of the Ivory Tower. The Millennial Movement matters. Our future is in their hands.

In this context, universities are scrambling to accommodate student activism for racial justice by incorporating the more individualized and personal side of it into increasingly depoliticized cultural studies programs and business-friendly, market-oriented academic ways of thinking. Not surprisingly, how today’s students frame their demands often reflects the environment in which they are being raised and educated. Postmodern theory, an approach which still reigns in so many liberal arts programs, encourages textual analysis that reveals hidden assumptions encoded in words; psychology has popularized the importance of individual trauma; and the neoliberal ideology that has come to permeate so many schools emphasizes individual behavior as the most important agent for social change. Add together these three strands of thought, now deeply embedded in a college education, and injustice becomes a matter of the wrongs individuals inflict on others at a deeply personal level. Deemphasized are the policies and structures that are built into how society (and the university) works. For this reason, while schools have downplayed or ignored student demands for changes in admissions, tuition, union rights, pay scales, and management prerogatives, they have jumped into the heated debate the student movement has launched over “microaggressions” — pervasive, stereotypical remarks that assume whiteness as a norm and exoticize people of color, while taking for granted the white nature of institutions of higher learning. As part of the present wave of protest, students of color have, for instance, highlighted their daily experiences of casual and everyday racism — statements or questions like “where are you from?” (when the answer is: the same place you’re from) or “as a [fill in the blank], how do you feel about…” Student protests against such comments, especially when they are made by professors or school administrators, and the mindsets that go with them are precisely what the right is apt to dismiss as political correctness run wild and university administrations are embracing as the essence of the present on-campus movement. At Yale, the Intercultural Affairs Committee advised students to avoid racially offensive Halloween costumes. When a faculty member and resident house adviser circulated an email critiquing the paternalism of such an administrative mandate, student protests erupted calling for her removal. While Yale declined to remove her from her post as a house adviser, she stepped down from her teaching position. At Emory, students protested the “pain” they experienced at seeing “Trump 2016” graffiti on campus, and the university president assured them that he “heard [their] message… about values regarding diversity and respect that clash with Emory’s own.” Administrators are scrambling to implement new diversity initiatives and on-campus training programs — and hiring expensive private consulting firms to help them do so. At the University of Missouri, the president and chancellor both resigned in the face of student protests including a hunger strike and a football team game boycott in the wake of racial incidents on campus including public racist slurs and symbols. So did the dean of students at Claremont McKenna College (CMC), when protest erupted over her reference to students (implicitly of color) who “don’t fit our CMC mold.” Historian and activist Robin Kelley suggests that today’s protests, even as they “push for measures that would make campuses more hospitable to students of color: greater diversity, inclusion, safety, and affordability,” operate under a contradictory logic that is seldom articulated. To what extent, he wonders, does the student goal of “leaning in” and creating more spaces for people of color at the top of an unequal and unjust social order clash with the urge of the same protesters to challenge that unjust social order? Kelley argues that the language of “trauma” and mental health that has come to dominate campuses also works to individualize and depoliticize the very idea of racial oppression. The words “trauma, PTSD, micro-aggression, and triggers,” he points out, “have virtually replaced oppression, repression, and subjugation.” He explains that, “while trauma can be an entrance into activism, it is not in itself a destination and may even trick activists into adopting the language of the neoliberal institutions they are at pains to reject.” This is why, he adds, for university administrators, diversity and cultural competency initiatives have become go-to solutions that “shift race from the public sphere into the psyche” and strip the present round of demonstrations of some of their power.

# Zimmer 16

#### Freedom of speech is necessary to any criticism of capitalism – it's the only effective tool to build a radical democracy

Tyler Zimmer 16. "Why Jonathan Chait is Wrong about Marxism, Liberalism, and Free Speech." March 29, 2016. inthesetimes.com/article/19007/jonathan-chait-marxism-liberalism-free-speech-jacobin

Take, for example, individual rights like rights to free expression. The Marxist argument isn’t that free expression is a bad thing; the argument is that liberals have an anemic, purely formal understanding of free speech rights that ignores the fact that, in practice, the ability to make one’s voice heard in public debates is extremely unequally distributed. After all, on paper Donald Trump and I both have the same formal, liberal right to free speech. But in practice, Trump’s immense wealth grants him orders of magnitude greater ability to express his views in public. For the classical liberal, the wealthy media mogul who owns newspapers and TV stations has the same free speech rights as the janitor who cleans his office. For Marxists, this absurdity reveals a fatal flaw at the core of liberal politics: it’s not possible to realize ideals of democratic self-rule, freedom and equality within a system based on radical class inequality. To their credit, modern American liberals have since moved on from the earlier, classical liberal denial that capitalism is built on class inequality—modern liberals in the United States, for instance, embrace some elements of the welfare state and view the labor movement in a generally positive light whereas this would have been anathema to earlier liberal forebearers. But this shift to the left must be seen for what it really is: an attempt to shore up an uninspiring and limited political project by co-opting programmatic demands from the socialist movement, including Marxism. But even on the terrain of basic rights—where liberals ought to be on firmest ground—liberalism isn’t as convincing as it purports to be. After all, what is the point of rights, such as a right to free speech, in the first place? Arguably, the Marxist answer to this question is far more persuasive than the liberal response. For liberals, “free speech” has no raison d’etre—it is an allegedly “natural” right we always have that seems to admit of no abridgement whatsoever. For Marxists, on the other hand, freedom of expression is not a free-floating abstraction—it’s a key aspect of the radical democratic vision of building a society free of oppression and exploitation. Marxists value free speech because they are committed to building a society where all can decide matters of public concern democratically, as genuine equals. Thus, the Marxist has a consistent way of explaining why speech that aims to dominate or marginalize others should be challenged rather than protected: it is contrary to the very values animating our commitment to free speech in the first place. What’s more, since our own society falls radically short of the democratic ideals of freedom and equality, it would be absurd to say that acts of disruption or civil disobedience aimed at realizing those ideals are wrong. Indeed, the rationale for disrupting Trump’s rally in Chicago wasn’t to prevent him from saying merely offensive or disagreeable things. It was about standing up to social forces that have the publicly stated aim of marginalizing and scapegoating some of the most vulnerable members of our society. It was for the sake of democratic values, not in spite of them, that tens of thousands of people turned out to shut down Trump in Chicago. So, on the question of free speech, the Marxist view is clear: free expression is valuable because it flows from an ideal of social and political relationships among equals in a just society. This explains why, to quote Jelani Cobb, “the freedom to offend the powerful is not equivalent to the freedom to bully the relatively disempowered.” It also provides a principled, consistent basis for opposing and disrupting the public acts of openly racist organizations that seek to subordinate, harm, scapegoat or marginalize others.

# Farber 17

Samuel Farber. [Farber has been involved in left and socialist politics for well over fifty years. His most recent book is The Politics of Che Guevara: Theory and Practice] "A Socialist Approach to Free Speech." February 27, 2017. Jacobin. https://www.jacobinmag.com/2017/02/garton-ash-free-speech-milo-yiannopoulos/

For some left currents, free speech and other democratic freedoms serve as an ideological cover for the bourgeoisie’s defense of private property. In fact, the capitalist bourgeoisie has never been deeply committed to free speech and other civil liberties, happily coexisting with a wide variety of antidemocratic political regimes, South African apartheid and fascism included. In the last analysis, private ownership of the means of production allows capitalists to maintain social and economic power independent of the political system. Indeed, breaking the ruling class control over socioeconomic power and establishing collective ownership depends on democracy: “the first step in the revolution by the working class,” proclaimed The Communist Manifesto, “is to raise the proletariat to the position of ruling class, to win the battle of democracy.” For the most part, struggles for democratic rights — such as free speech, the abolition of slavery, universal suffrage, workers’, and women’s rights — came after the bourgeois revolution. They were democratic conquests won through popular struggle. Free speech, free association, and other democratic freedoms allowed workers to fight for their interests. Some proponents of socialism from above tend to defend democratic freedoms only for the working class, but this perspective has a narrow and parochial view of a class that should be, as Lenin argued, “the tribune of the people,” the representative of the interests of the great social majority, and runs contrary to the socialist tradition’s strong emphasis on demanding universal political rights such as suffrage. In a more cynical vein, this political current has demanded free speech and other democratic rights only when they belong to the persecuted opposition. In contrast to this view, as Hal Draper argued in his 1968 article “Free Speech and Political Struggle”: “There can be no contradiction, no gulf in principle between what is demanded of the existing state, and what we propose for the society we want to replace it, a free society.” Consistent with this approach, we must defend free speech on its own terms, not merely because it helps to organize and fight for a new society. In this, free speech does not differ from the economic advances the working class and its allies have won. They are valuable both in their own right and because they strengthen the working class and its allies in their struggle for their emancipation.

# Bolotnikova 16

Marina N. Bolotnikova. "Title IX and the Critique of the Neoliberal University." April 5, 2016. Harvard Magazine News. harvardmagazine.com/2016/04/title-ix-and-the-critique-of-the-neoliberal-university

Neoliberal hold on universities prevents genuine and effective use of Title IX to combat sexual assault.

The AAUP touches on a broader theme on the edges of contemporary discourse about higher education: the idea of the neoliberal university, which links the ideology of neoliberalism—free markets, privatization, competition—to the policies of modern universities. “[T]he merits of Title IX as a principal instrument in the fight to end sex discrimination on campus must be evaluated in light of the increasing ‘corporatization of the university,’” the report continues. The shift “promotes a commercial model of universities, in which student satisfaction as ‘education consumers’ is paramount.” Such a model encourages university administrators to set policies unilaterally in response to market forces, undermining the faculty’s role in shared governance. Universities’ sexual-assault policies, in this model, are driven by the demands of education consumers (in this case, student activists) rather than by their efficacy in reducing sexual assault or attention to justice. The threat of losing federal funding for noncompliance with Title IX, too, factors into this calculus. In fact, the report argues, the efficacy of administrative responses like those embraced by Harvard is unproven. Citing the example of Harvard’s “single-purpose” Title IX office, it argues that universities’ responses to sexual assault prioritize complying with the letter of Title IX law and minimizing liability, rather than challenging the climate that contributes to sexual assault in a meaningful way. Royall professor of law Janet Halley, a feminist legal scholar who has been sharply critical of Harvard’s sexual-assault procedures, said universities’ systems of mandatory reporting, which require administrators and staff to report incidents of sexual harassment that are shared with them by students, undermine the interests of victims. “The appointment of us all as mandatory reporters is about liability,” she said. “They’re trying to routinize their exposure to liability, and that’s at the expense of the autonomy of victims—showing who’s in charge and whose interests are being served.” (HLS faculty voted to break from Harvard’s central sexual assault policy last year.) This critique of the neoliberal university puts the AAUP in strange company: with both social conservatives who oppose what they view as illiberal sexual-assault policies, and social-justice activists who invoke critiques of corporatization as they advocate those very policies. The neoliberal university model can also be used to suggest, for example, that universities are not interested in disciplining sexual assailants—because doing so would increase reported sexual-assault incidents, damaging an institution’s market cachet. The same analysis has been applied to demands, primarily from student activists, that universities change what’s taught in history, literature, and philosophy curricula to reflect the diversity of their students. Such calls have gained currency particularly during the current academic year: Yale announced a new center for the study of race and ethnicity, for example, following demands from protesters—drawing criticism that such programs are motivated by consumer demand rather than academic merit. Activists at HLS last semester began advocating for a program in critical race theory (a demand that so far has not been answered). Interpreting the neoliberal critique depends on how one might conceive of the role of faculty in governing their universities—and more broadly on how much influence the public should have over policies of universities, public and private. Challenging administrative control and the influence of market forces undoubtedly is in the interest of the AAUP, a strong advocate of faculty governance. But colleges increasingly serve a larger and more diverse share of Americans—one that still doesn’t resemble university professors, and whose needs may not always align with those of faculty. An obvious response to the narrative critiquing the corporatizing university might then suggest that it’s invoked to protect the interests of the faculty over those of students and other university affiliates. All this has made the question of student influence over their universities, and the proper role of the faculty, an open debate. In their recent book Locus of Authority, Princeton president emeritus William Bowen and Hamilton College president emeritus Eugene Tobin argue that the model of faculty governance isn’t suited to dealing with the challenges—legal, technological, economic—that universities face today. “We must ask,” they write, “whether it is reasonable to expect a century-old structure of faculty governance to enable colleges and universities of all kinds to respond to new demands for more cost-effective student learning.” Choosing her words carefully, Halley agreed that the influence of market forces on universities’ priorities has been worrying. “The AAUP report rightly notices the trend toward seeing students as consumers of educational services,” she said. “Title IX is just one example, where colleges and universities all over the country have very expensive bureaucracies to handle these cases in an isolated, bureaucratic way, cut off from every other value of the institution—cut off from academic freedom and freedom of speech concerns.”

## Stroud

Scott R. Stroud. The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn. Department of Communication Studies, University of Texas at Austin. Journal of Mass Media Ethics, 29:168–183, 2014

## Ralston

#### Dewey privileges democratic ideals over institutions. Ralston 10 summarizes the point,

Ralston 10, Can Pragmatists Be Institutionalists? John Dewey Joins the Non-Ideal/Ideal Theory Debate. Shane J. Ralston - 2010 - Human Studies 33 (1):65-84.

The next version of the objection pertains to Dewey' s writings on democracy. Political democracy signifies for Dewey the institutional phase of democratic governance, while democracy as a social idea (or way of life) points to the conceptual or theoretical phase (1927/1996, LW 2:325).23 So instead of grappling with the challenges of institutional design, this idea orients the democratic process towards a broader objective: namely, the enrichment of individual and communal experience, or the "creation of a freer and more humane experience in which all share and to which all contribute" (1939/1996, LW 14:230). Without the social idea of democracy, political institutions can become, as Roger Ames notes, conservative instruments of state-sanctioned violence: "On Dewey' s understanding, the familiar institutionalized forms of democracy - a constitution, the office of president, the polling station, the ballot box, and so on - far from being a guarantee of political order, can indeed become a source of just such coercion" (2008, p. 179). Thus, the second objection is that designing democratic institutions should be demoted relative to the aspirational ideal of democracy, given that institutions have certain unsavory attributes, such as being confining, tradition-bound, formalist and coercive.24 To summarize, the first version of the objection that pragmatists cannot be institutionalists pertains to the quality of experience, the second to the quality of the ideal. Together, the objection states that pragmatists express their anti- institutional bias by privileging either experience or ideals over institutions.

#### Institutions are only as durable as the ideals that justify them, which the pragmatist subjects to constant and continual criticism.

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In responding to this objection, we must first ask what institutions are for Dewey and for pragmatists, generally. In short, institutions consist of funded beliefs, habits and activities - what organizational theorists collectively label "organizational culture" (Schein 1993; Cook and Yanow 1993; Trice and Beyer 1993 and Martin 2002) and Michael Eldridge calls "révisable practice" (2009, p. 17) - that persist in time and space.25 All jokes concerning how institutions outlive individuals aside, their longevity is likely a function of how coherent the beliefs, habits and activities are that constitute them. According to Dewey, "[t]o say... [something] is institutionalized is to say that it involves a tough body of customs, ingrained habits of actions, organized and authorized standards and methods of procedure" (1927/1996, LW 3:153). So, ideas and ideals do not exhaust political experience; for their meaning to be suitably enriched, they should also manifest in political forms. In Dewey's words, "[i]deals... that are not embodied in institutions are of little avail" (1947, p. 10). However, ideals qualify the stability of institutional forms, permitting them to organically develop through criticism and reform. While Dewey acknowledges that successful "institutions... are stable and enduring," their stability is "only relatively fixed" because "they constitute the structure of the processes that go on... and are not forced upon processes from without" (1941/ 1996, LW 14:119). In Hegel's (1807/1979) philosophy of right, Kant's opposition between intellect and sense transforms into the dialectical-historical progression from self-alienation (slavery) to self-unification (self-consciousness) to reconciliation (the Absolute), where the principle that "the real is rational, and the rational is real" is realized in an institutional form: viz. the constitutional state. While Dewey's Hegel-influenced pragmatism dispenses with the Absolute, it retains a concern for how ideas and ideals influence the growth and reconstruction of institutions.

#### Institutional change depends on individual development in democratic society/democracy makes possible open-ended struggle to achieve emancipatory ideals.

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An emphasis on institutions, however, does not preclude a concern for individuals. According to Liam Murphy, "all fundamental normative principles that apply to the design of institutions apply also to the conduct of people" (1999, p. 251). Dewey's position agrees with Murphy's and goes one step further. Personal development for Dewey is a precondition for institutional development, since "individuals who are democratic in thought and action are the sole final warrant for the existence and endurance of democratic institutions" (1939/1996, LW 14:92). So as not to preemptively foreclose the many possible avenues for institutional change, Dewey avoided recommending a set of institutional arrangements or a final destination in the quest to realize a better form of democracy. In stark contrast, Francis Fukuyama declares that by the latter half of the twentieth-century "the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government" had been reached (1989, p. 210). Rather than advocate for "political democracy" or a discrete set of political institutions, Dewey proposed a set of leading principles or postulations in The Public and Its Problems that he together termed the "social idea" of democracy (1927/1996, LW 2:325).27 As postulations, these ideas are intended to direct subsequent investigations into the design of stable and viable governing bodies; however, taken alone, they do not directly correspond to any particular set of institutions.28 Dewey understands democracy as an open-ended struggle to achieve an emancipatory ideal which enriches individual and communal experience. Although "the measure of the worth of any social institution" is usually its "limited and more immediately practical" consequences, what the measure should be, Dewey insists, is "its effect in enlarging and improving experience" (1916/1996, MW 9:9-10).29 Realizing the ideal (i.e. the social idea of democracy) and enriching experience, therefore, demand institutional change. However, Dewey did not presume to know in advance - let alone recommend - the content of that change (i.e. the right set of institutions for a political democracy). (Ralston 2008, p.641)

#### Pragmatist institutional change requires open-ended experimentation.

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Of course, the difficulty with this account, at least for my argument, is that it cuts the wrong way. Following Dewey' s example would prevent pragmatists from walking in the shoes of institutionalists or, for that matter, engaging in non-ideal theory, especially when doing so means prescribing institutional solutions to social and political problems. A more promising account begins with the fairly non- controversial assumption that encouraging social and political reform demands, at a minimum, some degree of ongoing institutional transformation. Eliminating apartheid in South Africa required establishing and conducting a series of truth commissions, just as ending racial segregation in the American South meant that Southern colleges and universities had to adopt non-discriminatory admissions policies. Moreover, institutional transformation begs for experimentation with alternate policy instruments and objectives.30 Experimentation begins with the identification of those actual, not hypothetical, circumstances of the present situation. James Campbell contends that pragmatist policy making should resemble an open-ended experimental program: "[A]ll policy measures should be envisioned as experiments to be tested in their future consequences. As a consequence of this testing, the program will undergo ongoing revision" (1995, pp. 207-208). Likewise, Dewey writes, "[t]hinking ends in experiment and experiment is an actual alteration of a physically antecedent situation [and one might add: institutions] in those details or respects which called for thought in order to do away with some evil [or problem]" (1916/1996, MW 10:339, emphasis in original). Experimentation also involves a survey of those interests and values at stake in the eventual outcome (or valuation), the statement of intermediate goals or "ends in view," and tests of hypotheses or proposed courses of action. Frank Fischer explains: "Policies, he [Dewey] maintained, represent plans of action selected from alternatives having scientifically observable consequences that provide the basis for valid testing" (1980, p. 160). In the parlance of contemporary pragmatists and political theorists, experimental political inquiry starts and ends in the middle of things, namely, with the observation and manipulation of non-ideal, rather than ideal, conditions of politically problematic situations.

#### Pragmatism is non-ideal experimental philosophy interested in the possibility of institutional change.

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Practical philosophy, non-ideal theory and the most recent incarnation, "experimental philosophy," have, in a sense, cleared the way for philosophical inquiry aimed at the design and improvement of institutions.31 Stated differently, arm-chair philosophy, ideal theory and non-experimental philosophy are of little use to the institutional designer. According to Colin Koopman, Dewey "did not protest against the very idea of philosophy but only against the pretentious and unsustainable idea that philosophy might be able to grow its own flowers for itself without a care as to whether anyone else finds them beautiful" (2008, p. 17). So, if we take seriously the propositions that, one, philosophy is a "method... for dealing with the problems of men" and, two, philosophers should "care [about]... whether anyone finds it" relevant, these are two prima facie reasons for believing that pragmatists, who endorse both propositions, can be institutionalists. In short, they are willing to demonstrate philosophy's relevance to contemporary problems and to trace out the practical implications of their theoretical positions, including the institutional consequences. Moreover, pragmatists have not been shy to disclose their presuppositions about institutions, defining what they are (i.e. funded habits, beliefs and practices) and clarifying how institutional change should occur (i.e. through experimentation and reconstruction).

#### Pragmatism is a method of both interpreting and changing institutions.

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Many pragmatists and Dewey scholars have affirmed the value of not only theorizing about institutions, but also reforming them. According to Sidney Hook, "[t]he continuity of culture can mean nothing else than the development of its institutions. Their development, indeed, their very functioning, implies the continuous activity of human beings" (1933, p. 83). Hook was also a vocal public intellectual, social critic and advocate for institutional change.32 For James Campbell, another institutionally-inclined pragmatist, "[o]ur ideals are connected to the ongoing processes of living; they are rooted in particular difficulties and draw upon presumptive [institutional] solutions" (1995, p. 153). In a similar vein, Melvin Rogers argues that when group activity has indirect and harmful consequences for the welfare of others, publics form, propose solutions and pressure institutions to bend to their demands. In his words, "the emergence of publics should be interpreted as providing guidance for institutional transformation, but not as ultimately fixing the nature of those institutions" (2009, p. 231). And lastly, Eric Weber insists that, as pragmatists concerned with practical problems and their solution, "[w]e must respect our current configuration [of institutions], or show the ways in which it can be improved in achievable steps" (2008a, p. 379). As a pragmatist and institutionalist, Weber has been active in his Oxford, Mississippi, community and beyond, not only teaching the principles of policy leadership, but also advocating for substantive policy changes.33 Of course, the same caveat holds for pragmatists as for non-ideal theorists: If theorizing about political phenomena under non-ideal circumstances has institutional implications, then it behooves them to clearly state the key assumptions guiding their inquiries - e.g. what institutions are, the ways in which they operate and what factors influence how and whether they change, both as an empirical and a normative matter.